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In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX: VOLUME II

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PETITION FOR CERTIORARI FILED AUGUST 13, 1983
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On Plaintiffs' motion for a preliminary injunction, before the Honorable Luther B. Eubanks, District Judge, September 17, 1981, and September 18, 1981.

[36][1] **FRED C. DAVIDSON,**

the witness, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, answered in reply to the questions propounded as follows, to-wit:

Direct Examination by Mr. Coats:

Q. State your name, please, sir? [37] A. Fred C. Davidson.

Q. Where do you live, Mr. Davidson? A. Athens, Georgia.

Q. What is your business or profession? A. President of the University of Georgia.

* * *

[40] Q. All right, sir. From your perspective how does the athletic program and the academic program and the growth of your university, how do they impact on each other? A. Well, they impact in a sense directly and they impact on a much larger sense indirectly. Certainly directly, because our athletic program sponsors all of those scholarships, and many of them in band and other things. It's one of the major givers of scholarships. And in Georgia where you can have no gratuities we have to pay for out of state and everything, so it impacts directly that way.

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[1] Page references are to the hearing transcript, trial transcript and deposition transcripts. Correction of transcription errors and deposition changes have been made by agreement.

But the major influence is that today's universities are different. When I was there the University had forty-five hundred people in it, everyone knew each other, there was a sense of community that was built around the University. Today universities are federations of schools [41a] and colleges and in our sense thirteen. We're an institution that has a peculiar situation, we limit our freshmen input, we're larger in the middle than we are at the bottom, meaning that we have a lot of transfers that come in at the junior level, proven students. They move directly into upper division work, major work and that's where their loyalty lies.

Athletics and primarily football at the University is the one focal point that gives cohesion to all of our members, both students and alumni, it brings them back home, it's a kind of celebration in which we all have a common cause. So psychologically it has great impact, and it's not just on the alums, it creates a sense of pride on the part of the people of the state of Georgia. We recognize that's a responsibility, too.

So while we keep them totally separate as far as funding is concerned and everything else, there's no way to pull them apart as far as the effect on the life of the University, the community, its state.

Q. How does it affect your giving programs to the University? A. Well, there's no way to say precisely. We know instinctively however that it has quite an effect.

Q. Have you observed other universities that have deemphasized, for example — A. Oh, yes, I don't think there's any doubt. There [42] are several in our part of the country, and this is anecdotal, I mean, I don't know that I can particularly justify it, but we went through a period in which I remember North Carolina deemphasized football. Duke deemphasized football. It was not long before they were both deeply involved again because one public and one private, they simply were not keeping the attention of their sponsoring

society, it was important to them. And they are back in it now just like we are trying to be competitive.

• • •

[46] Q. All right. Now, did the CFA take any action in [47] regard to this TV study that they came up with? A. Did the CFA?

Q. Yes, sir. A. Well, that evolution, later witnesses I'm sure can track it much more precisely than I can. Our initial concern was as I said, over increased costs, over limited income, over lowered ratings and whether indeed in the best sense of a good judgment, television was being properly used as a source of income.

That study showed us that indeed it was not in our opinion, we shared that with the NCAA. That study came on — it was offered to our people I think two years ago for consideration, the study committee was kept intact, we have kept the NCAA informed of this.

At this last meeting in June we notified the NCAA that indeed we felt several things, that our property rights were ours, that the interpretation that they had come out with in April based on their knowledge of which we had not hidden in any way that we were continuing to explore television, that said we couldn't do that, that we didn't agree with that and that indeed we at that time as a group of institutions told them that in our opinion they did not have the right to negotiate our property.

From there we charged this committee to explore or back during the time to explore the feasibility of our [48] finding another carrier.

And through all of this there's one thing that I think is extremely important to my way of thinking and I think the minutes will show, that at any time this was discussed it was always couched in the way that what we were doing in the CFA

was offering an option to our membership. Membership in CFA was never contingent and still isn't accepting any plan that CFA offers. But we felt with television in the shape it was that our member institutions should be able to look at the plan offered by the NCAA, look at the plan that our committee could get and take the one that was best for their institution.

Now, we are still at this date in a position of not even seeing the NCAA plan.

THE COURT: Have any demands been made by you or any others that you know of to see it?

THE WITNESS: Well, yes, absolutely. We have asked in fact at our meeting in August of this last month in Atlanta, we asked the NCAA to come with all of the pertinent documents so that our people could look at what they had negotiated and what we have negotiated and take what was best for the institution.

Now, we have been told through all of this, and there's been coercion, I mean, there have been threats that indeed if you go with this you're going to lose all of your [49] possibilities and your other sports. And yet we have not been able as an institution, my institution, to sit down and make a choice between two contracts.

Q. (By Mr. Coats) Now, in the convention you were presented a contract with NBC, were you not? A. Yes, sir.

Q. And I believe we will show a little later that that was affirmatively adopted by the CFA at that convention? A. That's correct.

Q. And there was an opt out provision under the contract, that you adopted it and then later on had the opportunity to withdraw; is that correct? A. By the 10th of September, the original date.

Q. Yes. A. In fact, the way it was set up was we told our membership, and we asked by the way, we asked NCAA to

come and present their plan to us, and Wiles Hallock came, but he didn't have the plan, he didn't have a contract, we had ours in detail.

Our arrangement with our membership was that if a majority opted to the CFA plan that everyone would be bound to that plan on the 10th of September unless they opted out, but anyone could opt out whether they had voted for it or against it, they could opt out. And at that period then NBC would be able to look at the inventory of schools and say [50] this is a satisfactory inventory or it's not a satisfactory inventory or it has to be renegotiated.

It was at that time that there was a tremendous amount of confusion introduced in this. You know, it's really not as simply as saying if you don't like NCAA you can get out, it really just isn't that simple. But the threats of retaliation in letters saying that we will expedite, I mean, letters saying we will expedite enforcement procedures against you.

Q. If you stay with the contract? A. If you stay with the contract. Now, we did —

Q. Excuse me, how did that impact on the other CFA schools? A. Well, it has a chilling effect. All of our folks aren't primarily football schools, some of them are primarily basketball schools even though they're in the CFA.

Now, the threat to many presidents of having their basketball disrupted at the national level because of an action they took on a football contract can't have anything except a chilling effect and it did and it still does.

Q. Now, we're down till tomorrow where you have to make a decision, you as the chief executive officer of Georgia have to make a decision about whether to opt out of the contract that was approved by the CFA in August; is that correct? [51] A. Yes, sir.

Q. What sort of dilemma does that place you in? A. An impossible one right now.

Q. Tell the Court why, please? A. Judge, I have no problem with knowing where my responsibilities are. My responsibilities are the people of the state of Georgia, they are to the young people that come to that institution for the best education possible, they are also to the young athletes who have come there that we ask to come to provide for them an environment in which they can compete at the highest possible level that their talent will take them, national championships.

I also have no problem with understanding my responsibility to the banks that hold the eleven and a half million dollars worth of notes on the stadium that has to be retired out of private funds, nor to the promises I have made to the women athletes that we would continue to sponsor programs of national significance for them as long as the football team can keep generating the money.

What I have is a tremendous doubt as to where my authority lies right now. I do all of this based on the income that comes out of the football team. If I take a certain action concerning that football team, I jeopardize the opportunity for all of these other scholar athletes that we have, and as I said, we were third in tennis, sixth in [52] golf and ranked in track.

On the other hand I have this problem. And this has only come to bother me lately, and I think this is a danger, and I hope I'm not philosophizing. I think there's a real danger that we're looking to the called meeting of the NCAA to solve too many questions. I think we are not dividing the issues.

I am thoroughly pleased with the fact that the NCAA is going to call a convention to look at the reorganization. We have been fighting for that for years. We may even get it this time. But that doesn't, that still doesn't answer the dilemma that I face concerning my property rights, one is governance, one is business. Now, I mean, my own thinking leads me to see right now, can anyone guarantee me immunity if indeed we all get together and embrace each other in December and say, by

golly, we're all going to come back together and we are going to control television. Now, does that make me party to a conspiracy to either form or continue a monopoly? I mean, to me that's a very — that's a personal question and an institutional question.

I think what's really happened that concerns me the most is that NCAA as I watched over the last 15 years has moved from its concern over academic performance, over eligibility, over recruiting, over rules that have to do [53] with the quality of the game and they have gradually moved into business. And the great danger I see today is that apparently to them the business end of it is more important than the other end of it.

So I am left in the shape of saying, I guess, I heard this morning that all I have to say is, well, get out if you're worried about your liability. If I do that I fall back on my promises to an awful lot of young folks, and you absolutely can't just step out and set up a series of championships.

I see no reason why the University of Georgia should have to get out of the NCAA. I see no reason why the University of Georgia shouldn't remain master of its own fate as far as its business operations are concerned.

I am thoroughly convinced of one thing, the first payment I miss on that stadium, NCAA is not going to come pay it off.

Q. All right, sir. Now, do you consider that you are under threat of sanctions? A. Yes, sir.

Q. That if you indeed fail to opt out tomorrow or if the University of Georgia appears on the list that goes from CFA to NBC, can you tell us if it's been indicated to you that sanctions will be forthcoming? A. It's my understanding and I have heard it said [54] directly in meetings of the CFA by representatives of NCAA.

Q. That what? A. That if our name appears on that list proceedings will be taken against us.

Q. And what could those proceedings involve? A. They could involve our loss of the right to participate in any of the sports in which we're involved in with the NCAA, that's my understanding.

Q. And yet you believe I take it that the CFA contract is much more favorable to the University of Georgia than the NCAA one is? A. I think it's more favorable to all of our membership, not just on a dollar amount, but on appearances, and I think appearances many times are overlooked as being just as important as dollars that come in as far as exposure, particularly to some of our less successful schools.

Q. All right. Now, Dr. Davidson, did you by written document or by anything of that kind cede your rights to television football to the NCAA? A. No, sir.

Q. What position did the CFA take in regard to the NCAA interpretation? Did you consider that at your convention? A. Yes, we did. We took the position that we disagreed with the official interpretation, and that we also [55] have on at least two occasions told them that they did not have the right to negotiate our property at least without our consent, which they did not have.

• • •

[57] *Cross Examination by Mr. Andrews:*

Q. May it please the Court, Dr. Davidson. Going back to the purposes for the organization of the CFA, was the consideration of NCAA football television policy one of the original purposes for which the CFA was formed? A. No, sir, at least not to my knowledge it wasn't. And I was at every founding meeting. It may have been mentioned early as a concern through the NCAA, but it was not mentioned as a —

Q. It wasn't stated as a purpose in the original articles of the association? A. No, sir.

Q. When did the CFA commence its football television [58] study? A. You would have to ask one of the later witnesses specifically, I can't remember, it was maybe two, three years ago.

• • •

[59] Q. In the convention which you refer to which was held in June, June or July of 1980, was that a CFA convention? A. Yes, it was.

Q. And it was at that convention that the membership of the CFA first considered this television study? A. I'm really not sure. My impression is it was the first time the membership, not the board, considered where that study stood.

Q. How much earlier than that had the CFA board considered the television study? A. Probably nine months or so.

[60] Q. Would that have been prior to January of 1980? A. I don't remember, you'll have to get that chronology from someone more closely involved.

Q. Has the CFA ever brought since 1979, let's say, either at the annual convention of the NCAA in 1980 or any other convention of the NCAA, any legislation concerning football television to the floor of the NCAA? A. Not to my knowledge. We have acted in that case as we have in most in sharing our concerns with the structure of the NCAA and its television committee.

Q. I take it from what you said you have not gotten the satisfaction as far as the CFA members are concerned with the 1.6 rule or the 2.0 rule, the academic standard so to speak? A. Certainly I expressed my own opinion and my perception of my colleagues' opinions that that's true.

Q. Is that involved also with the restructuring of Division 1-A of the NCAA so that possibly Division 1-A, the football

schools at least, could set their own academic standards for the sport of football? A. That is one of the areas in which restructuring would do benefit. Once again though I want to separate that issue from the property rights issue.

Q. But those issues are all the ones which ultimately could be affected by restructuring the Division 1-A of the [61] NCAA if it takes place? A. Yes, it could have been affected five years ago had it taken place.

Q. And the CFA would have liked to have seen it five years ago instead of this December or sometime in the future? A. Yes.

* * *

[87] Q. Can you explain how we're going to take you and the other 60 members of the CFA out of business, sir? A. Certainly. It's not going to bother me, we're not a particularly big basketball school, but we have schools that are. And even the threat of sanctioning their basketball programs because of an action taken over the football program would absolutely jeopardize the job of some presidents.

Q. Isn't it true that if the 61 members of the CFA establish their own basketball tournament they would have the heavy majority of the finalists, the semi-finalists and the quarter-finalists in all the NCAA basketball tournaments going back twenty-five years or more? A. No question about that, but there are a lot of things that go other than having tradition. It's a fact that we don't want to be in a situation where the Marquettes and everyone else are limited. And you may say that it's very easy to do that, I doubt if it's very easy. To get out and start a competing tradition in basketball tournaments, I think the NCAA basketball tournament is great, I'm not [88] opposed to it at all, I don't see why I should be forced out of it.

Q. I understand that you would prefer to compete in the NCAA basketball tournament, but there isn't anything legally

preventing you from doing that, is there? A. Legally preventing me from what?

Q. Setting up your own CFA basketball tournament and conducting a basketball tournament? A. I assume there probably is, we're a member of the NCAA.

Q. All right. But if you're not, there's nothing preventing you from withdrawing from the NCAA and doing that tomorrow, is there? A. I would assume not.

• • •

[92] **WILLIAM S. BANOWSKY,**

the witness, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, answered in reply to the questions propounded as follows, to-wit:

Direct Examination by Mr. Ward:

Q. May it please the Court, Dr. Banowsky, will you please state your full name for the record? A. William S. Banowsky.

Q. Where do you presently reside? A. Norman, Oklahoma, Pickard and Lindsay.

Q. What is your occupation, sir? A. I am President of the University of Oklahoma.

• • •

[95] Q. Are you aware of the fact that the NCAA has negotiated the television broadcast package for intercollegiate football on behalf of the University of Oklahoma for a number of years? A. Yes, sir.

Q. Did the University specifically delegate this negotiating function to the NCAA? A. No, sir.

Q. To your knowledge how did the NCAA acquire that negotiating right? A. Well, I don't know, except my guess, my

assumption would be that it sort of grew through the years. There was [96] a time when there was no television of football games and yet the NCAA has a grand tradition which we all celebrate and appreciate. So we were members, and then television became important and some of the universities developed very distinguished athletic programs, and I think the NCAA assumed this right.

We grew so profoundly uncomfortable with their assumption of these rights and other attitudes on the part of the NCAA that that led to the formation of the College Football Association a number of years ago.

Q. Is the University's membership in the NCAA voluntary or compulsory as you understand it, sir? A. We regard it as a compulsory organization. We don't see how we would be able to field and maintain an intercollegiate program without the requirement of being members of the NCAA.

Q. During his opening statement, counsel for the NCAA suggested the University of Oklahoma would be free to do its own thing and withdraw from the NCAA if it so chose. Based on your background and experience in higher education, do you share that view, sir? A. No, I share the view with President Davidson that the chief executive officers of these universities have an extremely difficult, very anxiety-producing responsibility now because we're being called upon to try [97] to make decisions when we don't know what the outcome may be.

I should think it would be highly risky to the young people who participate in the seventeen sports at the University of Oklahoma if we were to reach the decision that we simply leave the NCAA. We don't know what the outcome would be. We don't know how they might be punished and generations that might follow them.

And I suppose I would say maybe distinguished counsel who regards that as an easy kind of thing to do might also consider leaving the Bar Association. I suppose one doesn't

have to be a member of the Bar Association. We don't have to be a member of the NCAA, but if one wishes to practice law, one has to be a member of the Bar Association. If we want to play football, we have to be a member of the NCAA.

They told us if we don't play football by abdicating our property rights, they not only will execute sanctions against our football program but all of the other sports as well.

Q. Do you believe these statements, sir? A. Well, I suppose in my responsibility one has to take seriously every kind of statement made with that potential disastrous impact.

Q. Is it the University of Oklahoma's desire to retain its status as a member in good standing in the NCAA? [98] A. Absolutely. I would like to be as forceful as I can in expressing our appreciation for very much of what the NCAA does. As I have said, it has a long and celebrated tradition. We want to be in that fellowship. We not only support but we join President Davidson in urging that the NCAA continue to have even more exacting standards academically for athletes.

We feel like the regulatory activities of the NCAA in terms of being sure that the sports are played fairly and that the academic standards are met are not only in order but also necessary.

• • •

[99] Q. Will you please tell this Court why if it is the desire of the University of Oklahoma to retain its status as a member in good standing the University of Oklahoma is joined in this lawsuit? A. Well, we did that frankly with fear and trepidation knowing that we had been threatened with sanctions, and although nobody has told me so because I join President Davidson in having never heard from the NCAA, never having seen a contract and all the rest. I was hearing rumors from all my colleagues that we might even be expelled from the NCAA.

It was a very difficult decision for the Board of Regents of the University of Oklahoma to decide to file this suit in this Court. And we didn't ask the CFA whether we should do it. We felt that was really inappropriate.

In fact, our argument here today is not that we want to be in the CFA or the NCAA, we are arguing that we should be free to negotiate our best interests of our property rights with the CFA, with the NCAA, with ABC, with NBC, with CBS, with the National Council of Churches or whomever else, that that's a precious right of the University of Oklahoma.

[100] So independently of any other consultation, our Board of Regents wrestled with the risk involved in the NCAA threats and decided that we had no other course in terms of our responsibility to the taxpayers of this state who own our university then to seek relief in the Court today.

* * *

[102] Q. (By Mr. Ward) President Banowsky, what is the economic importance or significance of the football generated revenue to the University of Oklahoma's other athletic departments? A. Well, it's the bread and butter, it's the milk and the dessert. We engage in seventeen intercollegiate athletic sports, including men's and women's, football and then eight men sports and eight women sports.

The only one which is revenue producing with the possible exception of minor revenues in basketball when we win the Big 8 championship as we did a year or two ago, but we don't regularly win that championship, and one or two of the other sports that have very minor revenues, the only [103] revenue producing sport is football. Football not only doesn't require one dime of taxpayers' money, it pays the way for itself and for all of the rest of the sports programs of the University of Oklahoma, men's and women's.

For the first time this year, Athletic Director Wade Walker came to my office with the news that we were going to run into

the red in our sports program, that's because of inflation, that's because of all of the money we invested in women's sports because of Title 9.

We have, Your Honor, in 1975 put forty thousand dollars into women's sports, 1975. This year, nineteen hundred and ninety thousand dollars, that's almost a one million dollar increase in a five-year period, all of which came from football revenues. Football picks up the deficit in tennis, track, golf, wrestling, gymnastics and all of the others.

We built a new track or surfaced the track with football revenues. We built a new baseball stadium partially with football revenues. We're building a gymnastics facility with football revenues.

And Mr. Walker advised me almost a year ago that I'd better go to the board with a recommendation that we do what at least a third of the schools in our conference have already done, and that is eliminate some of the so-called minor sports.

[104] The University of Georgia has eliminated wrestling. The University of Colorado has eliminated a number of sports. Missouri has. We wrestled all summer with a special presidential commission to try to find some way to produce enough revenues to be able to keep alive these other sports.

What's at issue here is not the survival of football, we're going to play football. What's at issue is whether outside sources are going to negotiate our property rights and drain off enough University of Oklahoma revenues so that we eliminate all of these other sports in which young people participate.

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[107] Q. President Banowsky, I think everyone would concede that the University of Oklahoma has a truly rich athletic

tradition. Does this rich athletic tradition have meaning to its academic as well as its athletic programs? A. Yes. As you know, Your Honor, my predecessor, George Cross, was the first to make the statement that he wanted to build a university our football team could be proud of.

I have tried to pick up that philosophy because I feel that it's time for Oklahoma to have a nationally distinguished university academically.

The point I wish to make is this: We have no greater asset in our aspirations academically than our rich athletic tradition because excellence is contagious. I am sure you know how much it means to our university, not to the football program but to our university, when sixty million people watch us in a distinguished performance in the Orange Bowl. We are very delighted that we will be on national television next week at the Coliseum in Los Angeles, not so people can see our athletes play other athletes, but because we're fighting to create a greater University of Oklahoma nationally. We have no greater asset than the national attention created by our great athletic tradition. And nothing would more greatly damage, and I mean this if the Court hears no other point from the President of the [108] University of Oklahoma, this is the one point I would want you to hear.

We could suffer no greater damage in our desire to become a nationally distinguished university academically than for us to suffer an erosion of the excellence of our athletic tradition. It creates as President Davidson said, a sense of community, a sense of excitement. He mentioned the two universities that dropped football and then have reinstituted it because they saw what they lost as a university. I would hate to think of trying to build what we envision for the University of Oklahoma without what our athletic tradition means to us.

There is an association, Your Honor, called the Association of American Universities. It is comprised of the fifty finest

universities in the country, twenty-five private and twenty-five public. The public ones are the ones that we should compete with, Michigan, Berkeley, Minnesota, Wisconsin, Texas. Oklahoma, Your Honor, is the only state in the Big 8 which doesn't have at least one university in that distinguished association of the best universities, and the state of Iowa has two.

We want to beat everybody in football, I want us to be the best academically. We have been willing to have regional comparisons in academics and were satisfied only with national comparisons in football. It is our football [109] momentum, our athletic tradition which gives us a great asset in this national aspiration. And I can't begin to overstate the loss that we would sustain if we lose our strength in that area.

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[111] Q. President Banowsky, there has been a lot of discussion about what is happening here today among chief executive officers of other universities, has there not? A. Yes, sir.

Q. And you participated in some of those discussions with your peers and colleagues? A. Yes, sir.

Q. Have you discussed with persons in parallel capacities with yours these threats of sanctions and the fears that they share? [112] A. Yes, sir, I think it's had a chilling effect within our conference. Some years ago, Judge, every member of the Big 8 conference joined the other schools to make the 61 in the CFA. In Atlanta early last month we had two schools of our conference to say we no longer feel that we can stay with the program.

And I can tell you in the meetings that we've had in the intervening weeks—and Your Honor, to indicate to you how important this issue is, I had been at the University of Oklahoma three years before I was ever in the same room with all of the other seven members who are presidents or chancellors.

We not only have been in the same room, we got very well acquainted. This is an extremely important issue whose resolutions, I think, may have implications as a watershed on into the next century. Which is why it shouldn't be settled with a gun at our head or in some kind of a rush.

The Court ought to have the time to weigh all of the evidence and then reach the decisions, and while the Court is needing that time the University of Oklahoma ought to have the right of all of the options. We want preservation of all of our options, and we want protection from sanction. I would say protection from sanction and expulsion or threat of expulsion, those are the two things for which we're pleading.

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[115] THE COURT: Let me pose a question, and I am not inviting additional problems, you've got plenty as it is, but let's say this Court should agree with you and the very able witness that preceded you, and say, all right, the NCAA has no right to determine your property rights in these telecasts and go with you all the way.

They argue that we have the right given to us by you when you joined our organization you became subject to our bylaws and regulations, so you subordinate these property rights for the benefit of the whole organization.

All right. Say I agree with you entirely. I don't see that you're home free because then your very best batter or catcher or pitcher or quarterback or tackle may say, when I joined the university I didn't give you the right to telecast my batting or my pitching or my football playing, I want to negotiate with CBS or somebody else. Aren't you going to be faced with the same problem? And you [116] say, well, when you came and joined the University of Oklahoma you subordinated your right to the rights of the university.

THE WITNESS: Well, that's an intriguing question, it has never occurred to me. I'll say this, we may have — when I go into a television studio as I'm sure you have, Your Honor, frequently they'll stick a little thing in front of me, and it's a mimeographed thing —

THE COURT: I've never been in one, but that kind of makes sense.

THE WITNESS: And I say, "What is this?" And in effect I'm going to sign that mimeographed sheet that waives all my rights, privileges, duties and responsibilities, which means that if the show's a great hit and makes a million dollars I don't get any of it and so forth.

I don't know but what Coach Switzer and the others require our athletes now to sign such a simple but appropriate waiver. If they don't now, we will begin it immediately because I think that's only appropriate for us to require of students whom we recruit and give them for the most part a very free and challenging education and provide the base for their career. And so it seems to me that that's a reasonable thing for us to expect.

THE COURT: Well, that's the very argument that these people here make with respect to their comforts afforded [117] you.

THE WITNESS: I'll tell you this, they haven't given us that kind of a statement to sign, and if they do, I'll recommend that we not sign it.

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[126] Q. (By Mr. Andrews) Sir, you spoke of the conditions that led to the founding of the CFA approximately five years ago, and the fact that you felt at least that the CFA was founded among other reasons because of the NCAA's appropriation of television rights of its members.

My question is during all that period since the CFA was founded, why hasn't the University of Oklahoma brought this question to the floor of the NCAA convention and raised the question as to whether the NCAA for future years has the right to control the manner in which you exercise your television rights? A. Mr. Andrews, if I said or implied that I thought the CFA was organized because we felt that the NCAA was appropriating our television rights, then I wish to correct that because that is not my knowledge or understanding, and I made a mistake if I left that implication.

In fact, I wasn't at the University of Oklahoma when the CFA was organized. My understanding is that the concerns were more nearly those expressed by President Davidson along academic regulatory lines as well as a general concern for the whole question of some reorganization so that [127] the football programs would determine the football rules.

I wasn't there and so I don't know for sure, but my suspicion is quite to the contrary that the television question sort of emerged out of the several years of frustration over these other issues which I've described.

Q. And it's true, isn't it, that since the CFA was founded they have continued to experience some frustration in getting some of their legislative proposals adopted by the NCAA membership? A. I would say consistent and very aggravating frustration which today, of course, brings us into Federal Court.

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[132] **CHARLES NEINAS,**

the witness, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, answered in reply to the questions propounded as follows, to-wit:

Direct Examination by Mr. Muchmore:

Q. Would you state your name, please? A. Charles Neinas.

Q. Can you pull the microphone around in front of you. Where do you live, sir? A. I currently live in Overland Park, Kansas.

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Q. (By Mr. Muchmore) What is your business or profession, Mr. Neinas? A. Athletic administrator. I am executive director of the College Football Association.

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[240] Q. Is there any indication or do you have any knowledge of any provision which provides that the NCAA would fix the amount paid to a national appearance and a regional appearance by agreement with ABC as opposed to that amount being set by negotiation between ABC and the individual schools that appear in those games? A. I think I know how the system operates if you want me to explain that.

Q. Well, there isn't anything that would prevent say a Texas-Oklahoma appearance from receiving a good deal more than a less attractive appearance if they were to negotiate a higher fee with ABC, is there? A. I would assume that the plan would provide that, it would be interesting to see what the reaction might be on it.

Q. Well, it would be interesting to see what ABC's reaction might be, is that right? A. (Nods head.)

Q. But they are committed to only pay a minimum aggregate amount each year for the games they televise and they are free contractually to split it up as they see fit between the institutions that appear in those games? [241] A. Mr. Andrews, what happens is the minimum aggregate is divided so that in actuality there is a portion of money set aside for national games and a portion of money set aside for regional games. And then what happens is this is what ABC offers to the contracting institution.

Q. Right. But it's ABC that does the dividing rather than NCAA. A. It is ABC that does the dividing, sir, but the NCAA consents to it.

Q. Well, they don't have any right to object to it, do they, under the contract? A. I guess they run a litmus test to see how it comes out with the NCAA television.

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[330] **DAN GIBBENS,**

the witness, being first duly sworn to testify the truth, the whole truth and nothing but the truth, answered in reply to the questions propounded as follows, to-wit:

Direct Examination by Mr. Coats:

Q. State your name, please? A. Dan Gibbens.

Q. Mr. Gibbens, where do you live? A. Norman, Oklahoma.

Q. What is your business or profession? A. I'm a Professor of Law at the University of Oklahoma.

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[332] Q. Over the years have you attended the NCAA conferences? A. The annual conventions, I have attended all of those beginning in 1977.

Q. All right. During those times have you seen efforts made at reorganization and that sort of thing between— A. Yes.

Q. — the CFA and other situated larger schools and the NCAA generally? A. Yes.

Q. And what sort of — Tell the Court about what efforts have been made and what the results have been? A. Generally

the idea has been to try to get within the NCAA a community of universities that have similarly designed programs. And as far as the University of Oklahoma is concerned and the schools in the Big 8 Conference our concern has been that as a group of schools that have highly competitive programs not only in football but in other sports that there are certain issues that yield one kind of a need with those highly competitive universities that are different from the great bulk of the NCAA membership. And I believe [333] there is something like 743 voting members in the NCAA, and the schools that have the highly competitive football programs are less than 100.

And so there are a number of rules which have been passed in the NCAA which are really designed to kind of accommodate the needs of those programs which are less competitive.

There's been a number of rules which have been adopted over time and prior to my work as the University's faculty rep, a number of rules which have been designed to establish a kind of, as we see it, a kind of a level of mediocrity and to make it more difficult to compete at the level of excellence that we would like to pursue.

And our felt needs in this regard to have rules which permit excellence seeking have been frustrated because we're in a small minority within the total NCAA body. The efforts to restructure the NCAA was designed to create within this membership of 700 plus a unit which could at least for competition purposes have its own rules that would be permissive of the kind of competition that we seek to achieve.

Too restrictive limits on scholarships, too restrictive limits on scholarship amounts, first scholarship numbers, scholarship amounts, too restrictive limits on the number of coaches that may be employed in a particular sport, too restrictive limits on recruiting practices, these kinds [334] of restrictions will frustrate the programs which are seeking national excellence, national high level competition.

And we know that our goals, our goals for excellence are not shared by the great majority of NCAA members, and they just really do not understand what it takes to run the kind of program that we and similar universities would like to run. So we wanted to create this unit within the NCAA to make rules that would fit our needs.

Q. So your objection to the original way were to those which were purely regulatory within though the framework of what the NCAA was designed to regulate? A. Yes.

Q. All right. Do you see that as being somewhat different than the areas in which they attempt to regulate or attempt to control television broadcasting? A. Quite different because the NCAA as I understand it was designed really for two things. And this is expressed in the Constitution. It was designed to provide rules of competition so that schools competing could compete on an equal basis, equal fair basis.

Whenever you have a game, whenever you have a competition you've got to have carefully drawn rules so that people are playing by the same rules. And so you do need recruiting rules, you do need scholarship number limits, scholarship amount limits, whether you need coach limits is [335] something else again. But you certainly need rules on the number of players and number of scholarships that can be granted so that everybody is competing on the same basis.

Now, the difficulty that the major schools have had with, the Division I type schools have had is that the rules which have been drawn for fair competition have been drawn for fair competition by the 700 and have not been drawn for fair competition by those who seek true excellence.

Now, let me, I think, come back to another part of your question. The NCAA has the purpose of reasonable regulations for fair competition, it also runs championships, those are the two, national championships in intercollegiate sports. The other area which the NCAA has gotten into over the years and

apparently by accident and not authorized by the Constitution. there's nothing in there that I see that authorizes it at all. is they become a highly business-oriented marketing agent for television primarily. And not only for the television rights for the NCAA championships which they do create and run, but the television rights for individual schools, regular season competition.

In my judgment this kind of commercial activity is really not authorized, I don't see it anywhere authorized in the Constitution. I know that it wasn't objected to over a period of years, I'm not sure why. But the commercial activity just doesn't fit within the NCAA role as a [336] regulator of intercollegiate sports, nor does it fit within the NCAA role of operating national championships. It is totally outside of that, and I think in some instances actually frustrates the regulation role.

We have been, the University of Oklahoma has been for the restructuring because we think that the rules do have a bias toward mediocrity that we don't appreciate. Be that as it may, we recognize that we need a national organization like the NCAA, and the NCAA has basically performed well the role of providing rules of the game. Basically we like the NCAA, we're loyal and devoted to the idea that rules for academic standards, rules for recruiting, rules for how the game is played are rules that we need.

We don't see any need for a single national organization to market our product. We don't see the need for the NCAA to tell us how to market our television rights, and we don't see any difference really between our television rights and the gate tickets that are sold, or the concession items that are sold, these are all aspects of our creation at the University of Oklahoma, incidents of our game which we ought to be able to market in the way that basically best suits us.

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[343] Q. All right. With your experience in this contract and with the CFA you have several times, have you not, been present in meetings where the NCAA indicated that they were going to take sanctions against the CFA schools if they signed the contracts much in the same way that they would take sanctions if they violated the competitive rules? A. Yes, I was at two particular meetings where that was discussed. I think probably as much influential as anything else, and this was referred to by the NCAA people that came to the meetings, but as influential as what was said at the meetings was what appeared in the newspapers, and it was kind of a repeated theme, a strong theme that any [344] university who remained committed to the CFA-NBC contract would be subjected to severe NCAA sanctions. And not only with respect to their football team, I suppose it's nothing worse than that as far as the University of Oklahoma goes, keeping us out of the bowl game, and that was specifically discussed in one of the NCAA releases as a real possibility but also our other sports. We've got gymnastics, obviously, that is headed for another year of possible national championship, our wrestlers have that kind of quality, and our basketball coach feels he's always going to be in contention for national championships. The sanctions discussed—hit all of the sports.

Now, here's the thing that seems particularly unfair to me, and it is that what we are talking about is not a violation of some recruiting rule, not a violation of some rule that has to do with fair competition, not a violation of the rule that has to do with academic standards, we're talking about a violation of a rule that has to do only with commercial activities which the NCAA is assuming to conduct for us which is not authorized by the NCAA Constitution even.

But the thing that seems so unfair to me, and I would like to reiterate, because it just strikes at the heart of the real issue between us and the NCAA at this time, is that the kind of sanctions, the very severe sanctions that [345] have to do with

athletes participating in championship events, that would prohibit them from participating, are talked about being applied on account of what? Nothing to do whatsoever with the athletes themselves, nothing that has to do with fair competition, the source of the sanctions is just peculiarly resulting from the commerical activity of the NCAA, which is of an entirely questionable origin in the first place. The fact that it's commercial is the main point.

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[346] Q. Yes. All right. As best you can compare those, what does it mean in terms of revenue for the University of Oklahoma between the proposed CFA contract with NBC and the proposed NCAA contract with ABC and CBS? [347] A. Okay. The University of Oklahoma would hope to get the maximum committed out of both contracts. In other words, we hope to continue to have the kind of football teams that will attract the maximum TV coverage. Making that assumption and using some rather conservative projections of how teams would be selected over the four years of these contracts, the amount that would be available to us over the four years under the CFA-NBC contract would be in the range of 3.8 million.

The comparison, as best we can judge it from the information we have about the NCAA contract is in the range of 2.0 million to 2.5 million. In other words, we're talking about over—well over a million dollars over a four year period. Now, honestly, I have to say that those are conservative projections in terms of minimizing the differences. And I have to emphasize that they are based on very limited information as far as the NCAA contract goes.

Q. All right. Thank you. But anyway for their purposes it's decidedly better in your judgment as far as returns of revenue for the marketing of our athletic programs on television would be substantially better than the NCAA contract as far as

you can tell? A. Probably realistically we would get about twice as much under the CFA contract as we would under the NCAA [348] contract.

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Cross Examination by Mr. Andrews:

Q. May it please the Court, Professor Gibbens. You indicated that one of the prime concerns of the CFA and its exception was certain rules that govern the NCAA's conduct of sports, particularly football, which insured a level of mediocrity in competition; is that correct? [357] A. (Nods head.)

Q. And you pointed to the limitations on the numbers and amounts, dollar amounts of scholarships, the numbers of coaches and certain recruiting practices; is that correct? A. Yes.

Q. Were those limitations adopted primarily for economy measures, and were they further restricted in the mid 70's to your knowledge? A. These particular restrictions, I believe the ones that you're talking about, were adopted before I became a participant. But I understand from my colleagues who were active at that time that they were adopted for economy measures. And the problem with that is, who's economy? Apparently for the schools that have programs with lesser budgets and less competitive goals. Not for the schools like the University of Oklahoma. We were not at that point asking for economy measures because the way in which we produce money as with many entities is directly related to the kind of expenditures that we're willing to make, and the more that we're willing to improve the quality of our program, the more we'll generate in terms of income.

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Trial before the Honorable Juan G. Burciago, United States District Judge, June 7-15, 1982.

[4] **FRED C. DAVISON**

was called as a witness by the plaintiffs, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Coats:

Q. Will you state your name, please, sir? A. Fred C. Davison.

Q. Mr. Davison, what is your business or profession? A. I'm president of the University of Georgia in Athens, Georgia.

Q. How long have you been president of the University of Georgia? A. The end of this month will complete my fifteen years.

Q. Briefly give the Court just a quick sketch, if you will, of your personal background and your travels to become president of Georgia.

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Q. Please tell the Court, if you will, a sketch of your background. A. I was born in Atlanta, Georgia, grew up just north of there, attended Marietta High School, Emory University for preveterinary work, graduated from the University of Georgia [5] in 1952, with a degree in veterinary medicine, returned to my hometown and practiced for six years, elected to limit the practice that I was in and feeling that that could not be done in my hometown, I took a break to gain some additional training that I wanted in clinical pathology. In order to do that, I took a position as a research associate at Iowa State University among several offers, with an Atomic Energy Commission project on the toxicity of stable rarities, a very exciting time in the evolution of that field.

A year later, I was named director of that project and simply became trapped in research and university work by my interest. I stayed with that project for five years, earned a PhD during a period in comparative pathology and biochemistry, brought the task force eight to its conclusion of its acute studies, was asked to move to Chicago as assistant director of scientific activities of America Veterinary Medical Association, was requested to move back to Athens one year later as dean of the College of Veterinary Medicine.

Two years following that, was asked to move to Atlanta as vice-chancellor of the university system of Georgia. After one year in that position, I was named the seventeenth president of the University of Georgia, in Athens, the job that I have held since 1967.

Q. In your capacity as president of the University of Georgia, did you become at least knowledgeable about the [6]athletic programs at the university? A. Yes, the University of Georgia is a member of the Southeastern Conference. In the Southeastern Conference only the presidents vote on policy, consequently, you have to become involved. Now, this was no strain on me, I had a personal interest and enjoyment in it, anyway. Also, under the rules of our conference, not only do the presidents carry the vote but our separate athletic associations are set up in such a way that the majority of their membership must be faculty.

In our case, the president automatically is the chairman of the athletic association, vice-president for business and finance is the treasurer of that, and the faculty chairman of the university becomes the secretary.

So there is no way at the University of Georgia to avoid very close daily contact, at least with the broader policy issues of what we are doing in intercollegiate athletics.

Q. All right, sir. Reference has been made to the fact that the actual plaintiff in this case is the University of Georgia Athletic Association. Just briefly outline to the Court, if you will, what the connection is and the relationship and duties and responsibilities of the athletic association. A. The University of Georgia spends no appropriative funds in any of its intercollegiate activities, those are the programs that—in which championships are offered by the Southeastern Conference.

[7] The athletic board was set up as an agency to function for the university, and if I'm not mistaken, actually that was established by an act of the legislature for both Georgia Tech and the University of Georgia. So that, in effect, while we don't have to, we do under that agreement send to the legislature and the leaders of each year, our audited books and everything else, but the University of Georgia Athletic Association does become the real agent for the university in all of these operations.

While we don't own the property, any capital improvement that is made on that property must be negotiated for and must be carried out through the activities of the board. All of the policies that we set internal are functions of the board.

So the athletic association is an operative arm of the University of Georgia, as far as its athletic program is concerned.

Q. Doctor Davison, tell the Court, if you will, why it was that the University of Georgia Athletic Association and you, also, became involved in this lawsuit. A. Judge, it's something that evolved that didn't happen as a single decision.

I don't know exactly, counsel, how far back you want me to go, but I can go back and trace it if that's all right.

I have had a continuing concern, and perhaps this is the root of my real interest, with N.C.A.A.'s activity, particularly [8] the arena of academic standards because I think that they have been detrimental to the high school athlete in our state by not offering a challenge to the athlete at the stage in their development, not using it as an incentive for academic performance.

When I came as president of the University of Georgia, for instance, there were two associations that still had some sort of objective floor for participation; Atlantic Coast Conference and the Southeastern Conference, to my memory.

The N.C.A.A. was moving toward what came to be known as their one point six rule, which incorporated the use of some objective standards, such as S.A.T. or A.C.T and performance, grade-point average. We knew that at the conference level and we went about putting together our one point six table, the N.C.A.A. table that came into being, and by the way, it was an excellent table, and it was at that time I had no concern at all, when it came into being, we request to give up our separate standards. We did give up those standards. One year later or two, I can't remember specifically, the N.C.A.A. standards were modified and weakened, in my opinion, by substituting rank in class for grade point average; the near year we were asked to give up all of those standards and go to a simple two point high school graduating average, which at a time when grade inflation was beginning, took all of the pressure off of the high schools; all you had to do was stay [9] in school, get a two-point average, took the pressure off the coaches and took the pressure off the high school faculty, and in many—in our part of the country, many of our perspective athletes simply don't have the encouragement at home to perform in high school. We lost that.

Now, this was a problem that I have been fighting ever since. In fact, it led to my first interest in the C.F.A.

Q. Right there, tell the Court what the C.F.A. is, please. A. The C.F.A. is a group of institutions that have common interest primarily in the sport of football that form together out of a sense of separate frustrations, at least this is my interpretation, its dependency and its membership comes from the conferences. Each of the conferences elects someone to a board of directors, the independents have elected representatives to that board, and the separate conference commissioners have an elected representative to that board.

Now, I think that probably along with any concerns about academic standards, which I felt could be addressed if the N.C.A.A. were not quite so monolithic, and if it could be reorganized to a point that those of us with common interest could look to our own standards and our own rules inside the N.C.A.A.

So initially, my approach to the academic standard problem was on that, looked at the organization of N.C.A.A., itself, [10] and the potential reorganization. This was a very frustrating time. I can't remember the dates, but gosh, it's been back in the mid Seventies, we offered programs for reorganization, they got voted down in the Atlantic Conference, we came very close to a reorganization, but an amendment that was put in by the Ivy League again spread us out so that we didn't have that cohesive group that could make their own decisions.

In my case, the one I was interested in was again strengthening the academic standards, but this continuing of organization came into it at that point, and the C.F.A. was the result of that kind of frustration in which these schools came together and said, "Can we—can we come together as a consensus group, with the coaches' group, athletic directors' group, faculty-chairman groups and commissioners' group that could meet, could discuss the problems we have in common, could become cohesive enough to offer those—and we are an affiliate number of N.C.A.A., offer those to convention in N.C.A.A. in an effort to maybe bring out our concerted effort to getting some of these issues past, and adopted into the rules of the larger organization?"

This—this C.F.A. was formed initially after an organizational meeting at which I was asked to attend as a member of the Southeastern Conference, elected by the other presidents in that conference. I was elected chairman of the board in that organizational meeting, and that is the position [11] I have held and I have been the only chairman of the C.F.A. until this past weekend, when normal rotation, I rotated off that board, and that board will elect its new chairman from its new board.

So I have followed the activities of that group with great interest.

First two or three years, virtually all of the discussion in the C.F.A. centered around academic standards, most of the options that we offered in the form of proposed legislation to N.C.A.A. addressed these.

We also looked at coaching, recruiting versions. We offered other legislation, but their primary thrust was academic both in discussions and what we offered.

Now, concurrently with a great deal of this activity, there were other things that were imposed on us. Title Nine. The University of Georgia was the first institution initially audited under Title Nine. We have very recently received full clearance in that audit, and I think we are the first major university to receive that, but there were—there were beginning to be imposed on us, for good reasons, brand new costs.

Now, at the university, I want to reiterate, that there are no appropriative funds. So whatever expansion takes place at the university must come out of the funds that we generate from the resources of our athletic program.

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[13] Now, I began to have some concerns at this point about television. First time I had. One was during that period the ratings were dropping. The professional ratings were going up in television. The college ratings were going down.

Two, all of a sudden I realized that, in essence, there was no real competition in the marketplace to say that another way the University of Georgia had no options as far as its television path was concerned. It didn't cross my mind at that time that that was anybody's fault but ours. Never [14] crossed my mind that I didn't have the right to seek other options. The television committee was instructed through a period of time,

and this is over a period of time, in which to continue to examine this in which I also sensed a building resistance on the part of the hierarchy of the N.C.A.A. Coming at one time were the reinterpretation of something that in their bylaws, I couldn't interpret that way; that indeed they did have sole right to my property, the university's property, as far as television is concerned.

I told them I didn't think they had that right.

Our television committee continued to look at this, and sometime in June of last year, we instructed them to see if that committee made up of voluntary people, all of whom had other jobs as football coaches or law professors or something else, and I was on that committee, to see if an alternative package could be negotiated that could be put before me as the person held responsible for the physical soundness of the University of Georgia's athletic program, that I could view against the negotiated package that N.C.A.A. was doing for me and give me the right to take the one that was in the best business interest of the University of Georgia.

Now, the business interest also includes many things besides dollars, as far as I'm concerned, in my responsibility—my responsibility to keep the stadium full, to keep people wanting to come back, so I had to look at it. Well, this [15] group went out and in a very short time brought back a package, not just a package, but a written contract with N.B.C., for me to view. Starting back in the spring, I tried to begin to find out what the specific counterproposal would be from N.C.A.A.

We had Mr. Hallock, who will be here, come to our meetings, and all we could get were the principles of negotiation. We couldn't see a contract. We met in Atlanta, the N.B.C. contract was in hand for me to look at. There was still no contracts that I could look at.

We had a second meeting in Atlanta, and this was only a couple of days before we had to opt in or out of the N.B.C. contract; Wilson came back and there was style.

Now, imposed on all of this was this mounting concern that not only said that they owned—that N.C.A.A. owned my property, the university's property, but that indeed if I continued the action I was taking, sanctions would be taken against the institution, and the implications were that those sanctions would not be just in the football program, but could be against all of the programs that we have.

Now, if you don't think that has a chilling effect, you have to realize that the University of Georgia has a broad gauge program that competes, well, nationally, and if I lost that right, I disenfranchise every one of those young scholar athletes that have come, their understanding that they would [16] have that right to compete nationally.

And the same effect was building in the other schools.

Q. You're talking here about other sports as well as football? A. I'm talking about all, basketball, tennis, everything. And that was the implication. In fact, it was stated, it was stated in our Atlanta meeting, that not only that was the fact, but that those sanctions would be expedited.

Q. Who stated that? A. Tom Hansen is our member.

Q. Who is Tom Hansen? A. He is an employee of the N.C.A.A. And it was also in the press at the time, you have heard that N.C.A.A. activities are covered in the press, so are C.F.A., but it was covered in the press that indeed these threats were real.

MR. HARRY: Your Honor, I object to the testimony and ask that it be stricken, of threats in the press, unless that is specifically identified and made precise.

THE COURT: Well, reference was made to the previous hearing before Judge Banks, and I think the Court's aware of it, I know of the nature of it, so the objection is overruled.

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[20] Q. What did you observe, if anything, among—without saying that they said or anything, what happened, what was the observed effect of these threats on the other institutions? A. That they simply couldn't take the chance of incurring the sanctions that the N.C.A.A. would impose on them.

Q. And, therefore, abandoned the N.B.C. contract? A. That's correct.

• • •

Cross Examination by Mr. Harry:

Q. And you have now seen the contracts between the N.C.A.A. and the networks for 1982, haven't you? A. I haven't studied them.

Q. Have you seen them? A. I really can't say that I have.

Q. You don't recall having received copies from Mr. Neinas? A. I remember in our conversations that one was there, but it had been sent.

Q. So you have had the opportunity? A. Absolutely, yes.

Q. Now, is Georgia proceeding at the present time to make contracts for its football games on television this fall? [27] A. We are.

Q. Pursuant to the N.C.A.A. contracts? A. We are.

Q. And how many of those game contracts have been made, sir? A. One, to my knowledge—oh, excuse me. Inquiries have been made about one game. We have not seen the contract for that game yet.

Q. And what game is that, sir? A. That will be the Clemson game on Labor Day night.

Q. Now, are you knowlegeable about the arrangements for that game? A. In general.

Q. Could you tell the Court how that came about? A. To the best of my knowledge, it came from a telephone call to our athletic director asking of our interest in changing our game with Clemson two weeks earlier, placing it on Monday night of Labor Day.

Q. That would be September 6th, 1982, would it not? A. Yes, sir, I assume so.

Q. So, Doctor Davison, did that call come from the A.B.C. network? A. I don't know.

Q. And could I just recap for the Court, and say that I believe we understand that Georgia and Clemson were [28] scheduled to play at Athens in the daytime on Saturday, September 18th? A. I can't remember specifically, but that sounds right.

Q. And that's a big game because Georgia was the national champion two years ago and Clemson was the national champion last year? A. Yes, sir, it's always the big game.

Q. So, at the behest of the network, A.B.C., Georgia agreed to move that game from September 18th to the night of Labor Day, September 6th? A. That's correct.

* * *

Q. Now, has a price been agreed upon for that game? A. I have heard figures. I have not seen a contract. My understanding from that athletic director that what we were offered was a one point one million dollars to be divided, plus a fee of two hundred fifty thousand dollars [29] that was a relocation and costs above normal cost incentive.

Q. Now, is that one million one hundred thousand you referred to to be a payment from the network to the schools to be divided between them in what we call a rights fee, sir? A. I am not familiar with the terminology.

Q. Is it your understanding that the two teams divide a million one hundred thousand dollars equally? A. That's my understanding.

Q. And what is your understanding about the two hundred and fifty—did you mention two hundred and fifty thousand dollars figure for moving? A. Yes, I did.

Q. What is your understanding about how that is divided? A. It will be divided equally.

Q. And is that a part of—is that in the same category or different category from the million one hundred thousand dollars? A. In our—I assume it's different and it was a separate part of the the contract, or offer.

Q. Is it not true, Doctor Davison, that Georgia does not keep this money that it receives for televising—for the rights to televise football games? A. That's correct.

Q. Where does the money go? [30] A. It goes to the Southeastern Conference.

Q. What do they do with it? A. They divide it up on a formula and distribute it to the institutions.

Q. And how many members are there in this Southeastern Conference? A. Ten.

Q. Who are they? A. Both Mississippi, Mississippi State, Alabama, Auburn, Georgia, Florida, Tennessee, Vanderbilt.

Q. Louisiana? A. And Louisiana State, excuse me.

Q. And so that all those other nine institutions share in this television revenue? A. That's correct.

Q. And how do they share? A. I can't tell you precisely. I think that it's divided up into fourteen shares and I would have to check the books. I believe we get four thirteenths—excuse me— thirteen shares, the home team getting a larger portion. The Conference gets a share and the rest is divided equally.

Q. So essentially the team that plays from the Conference gets one or two extra shares for its being involved in the game is your understanding? A. That's correct.

[31] Q. Over and above what other members in the Conference get? A. That's correct.

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[33] Q. And is it not true that the College Football Association was formed for purposes other than the television matters? A. That's correct.

Q. And television came up later, after it was already in being? A. As an incidental.

Q. Now, what has the College Football Association done in regard to this lawsuit? A. Took an interest initially as we were trying to get an injunction. The board of directors and, in assembly, in accepting the budget, said that they would underwrite or would bear the cost of the expense until the next general meeting, [34] which was yesterday—which was this weekend.

Q. And, of course, that—has it, in fact, borne that expense? A. It was decided at the general meeting in Dallas, that indeed, it would, it would cover those debts incurred through yesterday, up to today.

Q. But not after today? A. That's correct.

* * *

[35] Q. Has Georgia ever availed itself of that kind of exception telecast, to your knowledge? A. Not to my knowledge, I don't believe.

Q. And is it not true, Doctor Davison, that the rules of the Southeastern Conference prevent any of its members from using the exception telecasts when they're playing a game with another Conference member? A. I am not certain, but I believe that there is a mileage restriction, but I am not certain about that. I know there [36] is a Conference rule concerning it.

* * *

[38] Q. Now, you're concerned about the legality of Georgia coming to participate in the N.C.A.A. television plan, are you not? A. Yes. I am also concerned about the N.C.A.A.

continuing that kind of activity in this progression of my concerns that started out with funding and going on to property rights. The more I looked at it, the more it became evident to me that indeed, I might be part of a monopoly, I might be part of a price-fixing scheme, and that's basically what I asked this Court to tell me when I was here in the fall, was to tell me what the limits of the law are, concerning my involvement in this kind of activity.

Q. That was—you're referring to the preliminary injunction before Judge Eubanks? [39] A. Correct.

* * *

Q. So, you're still asking the court to resolve that basic concern? A. My major—I have always been more in the position of asking for declaratory judgment about what I could do.

Q. But you do not, at the same time, seek an injunction invalidating the N.C.A.A. contracts that are now in existence with the networks? A. I have a hard time separating the property rights issue from the initial questions.

[40] Q. So—A. So, I am—yes, I am interested in knowing what my legal position is as far as restraint of trade in the Sherman Act, so, indeed, I can make the proper decision after that as to what the university should do or another group should do.

Q. So, if the decision upholds the legality of the plan you would feel free in going ahead—and safe—going ahead under it? A. Yes.

Q. And if it holds the plan illegal, then you would exercise your judgment as to what you should do? A. That's correct.

* * *

[58] Q. Now, you will recall, Doctor Davison, after this lawsuit was started, a temporary restraining order was entered into by Judge Eubanks, at the request of Georgia and Oklahoma? A. Yes.

Q. And the purpose of that was to protect you both from any coercion or threats, wasn't it? A. That's true.

Q. And wouldn't you agree, Doctor Davison, that N.C.A.A. at all times complied with that temporary restraining order? A. No. They have brought no sanctions against any of the in[illegible]utions, if that's what you mean.

Q. It's a little broader than that. After September 8, 1981, when this suit started, and the temporary restraining order was entered, are you aware of any coercive action by the N.C.A.A.? A. None, specifically, no.

Q. Certainly none in connection with Georgia. A. That's true, not concerning the television.

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[63] Q. Doctor, isn't it true that the N.B.C. contract with [64] C.F.A., gave its members a certain period of time in which to opt out or elect whether they would be bound by it? A. That's true.

Q. And did not that time, as it was extended, finally expire on December 14th, 1981? A. I can't remember the date. I remember there was a first date in early September and because of this activity, that was set forward and then it may have been set forwards, again.

Q. You wouldn't dispute that the ultimate decision on the N.B.C. contract was on December 14th? A. No, I wouldn't.

Q. And did Georgia tell N.B.C. that it would adhere to the contract? A. Georgia did not, it was an opt-out situation, and Georgia did not opt out.

Q. Did you then adhere to the N.B.C. option and maintain that you would go with that contract? A. We left our name in the position that if N.B.C. had a viable package, a viable

inventory, that, indeed, Georgia would be part of that. Again, depending on the outcome, I assume that would be tied up in whether those property rights were ours and everything else that's part of this court action.

Q. And what other members of C.F.A. took the same position as Georgia and indicated they would participate in the N.B.C. contract at the end? [65] A. I have no knowledge of that.

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(EXHIBIT YY-1)

DEPOSITION OF DR. FRED C. DAVISON
DEPOSED FEBRUARY 3, 1982.

Dr. Fred C. Davison, having been duly sworn, testified as follows:

[75] Q. Now, was NBC led to believe that the University of Georgia was part of the inventory being measured for its adequacy? A. We had never formally notified them that, but I assume that they would have assumed that we were because of our interest in the program—my particular interest in the program.

Q. Did NBC ever articulate the universities and colleges that it thought were available for its television contract? A. It did not—not to me.

Q. Well, how do we find out other than asking them, which we'll probably have to do, what football teams were available to their television program? A. I couldn't tell you.

Q. All right. How were the CFA members expected to let NBC know whether their games were available for its televising [76] or not? A. By notifying the CFA office as a clearing point of whether they wished to remain part of the inventory package or not.

Q. Okay. And did Georgia so notify the CFA office? A. No.

Q. So the CFA office didn't know whether Georgia's team was in or not unless it went on this Exhibit #1 letter, which indicated they weren't in? A. In a conversation on that the day before with Mr. Neinas, I told him that the University's position was that we were standing firm. I had absolutely no desire to be a martyr. If, however, the inventory dropped low, I thought it would do better for us to, indeed, as an organization just offer no package, but I don't know what was done beyond that point.

Q. In other words, Mr. Neinas was handling that, and you're not familiar with the details? A. That's correct.

Q. And you wouldn't have knowledge as to what other universities who are members of the CFA did in terms of advising Mr. Neinas on that subject? A. That's correct.

Q. Okay. All you know is that NBC, on the basis of whatever it was, deemed the inventory insufficient and announced the contract would not proceed? [77] A. That's correct.

Q. Okay. Doctor, do you know whether NBC was ever advised that there was any inventory? A. No, I can't answer that. I don't know.

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Q. So isn't it true, Dr. Davison, that from the time Judge Eubanks entered his order on September 8, 1981, until the time the crucial decisions were made by the CFA members, nothing coercive or threatening was done against CFA members by NCAA? A. I can't answer that. I can only answer for the University of Georgia.

Q. And you know, in fact, that nothing of that sort occurred in connection with the University of Georgia? A. That's correct.

Q. Okay. Let me show you, Dr. Davison, Mr. Neinas' letter of December 15 to NBC with a copy to you. Mr. Coats probably knows about it already, but that seems to relate to the subject. A. I read it.

[78] Q. Does that refresh your recollection that you received a copy of Neinas' letter to NBC, advising that CFA cannot provide a sufficient inventory of member universities for seasons beginning in '82 to allow the NBC contract to proceed? A. Yes.

• • •

[105] Q. Was there a time when CFA considered changing its name to the College Sports Association? A. I can't really speak to you. You'll have to talk to people who were at the last meeting of the CFA. The only board meeting I've ever missed was the one at the last NCAA (sic) meeting because I did not attend the NCAA meeting. It may have been discussed there. There has been some general talk among many presidents that there needs to be another organization, but it's not come up in the CFA board meetings as an item.

Q. What has been your involvement in discussions about forming a new sports association that would take over some of the activities now conducted by NCAA? A. My position has been routinely and uniformly that our desire was to stay within NCAA. I have heard discussions of this type, though, as far back as four or five years ago as I [106] sensed a mounting — sensed a frustration on the part of other presidents with NCAA.

Q. So these have been outside of CFA activities? A. Outside of any specific agenda items in CFA.

Q. And have been, more or less, conversations among executives with common interests and problems? A. I will broaden my answer just a little bit. There have been several times just in discussion among CFA members but not toward any action that, indeed, it would be nice if basketball could be considered, because they're essentially the same schools as football, under an umbrella organization, but only in a way of general discussion, never by way of action or suggested action.

Q. Are you sure that Mr. Neinas drew up a structure for the national sports organization that would parallel the NCAA?

A. What's the date on that letter?

Q. It's November 19, 1981. I'll get it identified so you can see it. It's now marked as Exhibit #20, Doctor.

(. . . Defendant's Exhibit #20
marked for identification
by the Court Reporter. . .)

A. I assume this came through my office. I don't remember reading it, however. It was designed, as I see, as a discussion paper with the conference commissioners and others [107] meeting in late November, so I assume he drew this up. It bears his name.

Q. Yes, you don't recall seeing it before? A. I don't recall seeing it specifically.

Q. And were you aware that Mr. Neinas had drawn up such a structure? A. In our conversations — I thought it was after the first of the year. I remember him mentioning the fact that, indeed, several had asked and, in fact, in our conference meeting, more than one president had suggested that we — and, in fact, had it been a voting meeting of the Southeastern Conference, I imagine CFA would have been requested to draw up such a document, but it was not. It was general discussion again. I'll get this out and look at it, though; it may be a good idea. There's an awful lot of talk about it around right now.

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[148] Q. Dr. Davison, I'm going to show you Exhibit #26, a letter from Mr. Neinas to Dr. Singletary of Kentucky with a copy to you in which he urges Dr. Singletary to move or work for establishing a task force to develop an outline of a new organization which would be parallel to NCAA. I think it shows. It says he discussed the matter with you, and if you'd look at it, then I'll ask another question.

[149] (. . .Defendant's Exhibit #26
marked for identification
by the Court Reporter. . .)

Q. My question is this, Dr. Davison. Did you discuss with Mr. Neinas the matter of developing an outline of a new organization that would supplant NCAA in part? A. I'm sure that in general discussion terms this has come up in our private discussions.

Q. Was it between you and Mr. Neinas? A. Yes.

Q. And did you encourage Mr. Neinas in that discussion to enlist the CFA Commissioners' Committee to develop an outline of a new organization? A. I don't remember specifically doing that. I think it would probably have been more likely that, indeed, in our discussion which — and by the way, President Singletary had made the statement many times that we better get about setting up a parallel — that this would probably be a good item for discussion at the commissioners meeting, but I did not set that agenda.

Q. Did you encourage Neinas to proceed to get the CFA Commissioners Committee to develop an outline of a new organization? A. I don't know whether you would call it encourage or not. I don't remember the specific conversation that we had. [150] I certainly did not tell him, "Don't bring up anything like that."

Q. Do you deny that you encouraged him to do that? A. No, I certainly don't. I'm just saying I have no specific memory.

Q. You don't disagree with the statement here, you just don't remember clearly? A. I have no problem with this statement, actually.

Q. In other words, you would be happy if he would enlist the commissioners committee to develop an outline of a new organization? A. I think in a case as ours is developing, you'd be wise to look at any option you have even though I have maintained all along that our position — that my intention is to keep us within the NCAA, but you're foolish not to have an option.

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[76] **CHARLES M. NEINAS**

was called as a witness by the plaintiffs, and have been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Coats:

Q. State your name, please? A. Charles M. Neinas.

Q. Where do you live, Mr. Neinas? A. Boulder, Colorado.

Q. All right, sir. What is your present occupation? A. Executive director of the College Football Association.

Q. How long have you held that position? A. Two years and two months, approximately.

Q. Tell the Court, briefly, your background and professional experience. A. After graduation from the University of Wisconsin, I was involved in radio and television work, subsequenctly joined the staff of the National Collegiate Association in 1961, and joined the Big Eight Conference as commissioner in 1971, and remained in that position until April of 1980, when I became employed by the College Football Association.

Q. All right, sir. Were you the first of the employees of the College Football Association? [77] A. Yes, sir.

Q. And what does that staff consist of now? A. The permanent staff consists of my assistants and myself.

Q. Now, what are your duties inside the C.F.A.? A. To administer the program developed by the board of directors and conduct the daily business of the organization.

Q. Have you become, over the years, familiar with the methods and structure by which the N.C.A.A. governs the televising of college football games? A. Yes.

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[80] Q. (Mr. Coats, continuing.) Now, with reference to Plaintiffs' Exhibit Two, can you describe to the Court, please, the background and the timing under which that interpretation [81] came out? A. The College Football Association was investigating matters pertaining to football television, and there was to be a vote on what the N.C.A.A. calls the "Principles of Negotiation," which authorized the N.C.A.A. to proceed to negotiate a new television contract—or contracts. The interpretation served to indicate that the N.C.A.A., through history and tradition, had control of football television, and—although this had been challenged on the basis of the fact that there had been nothing in the constitution and bylaws of the N.C.A.A. that specified that control existed.

So the council adopted an interpretation, it is my understanding, it was done the day prior to the mailing of the "Principles of Negotiation" to the N.C.A.A. membership.

Q. To your knowledge, is this the first document by which the N.C.A.A. formally asserted control over all of the televising of football games? A. Yes, sir.

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[104] Q. Mr. Neinas, do you know of any instance of N.C.A.A. television football in which any college or university was paid any price, other than the regional price set for that year, or the national price set for that year? A. I know of no difference in the price set of any game.

Q. And that means also the price actually paid for that game? A. That's correct.

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[106] THE COURT: Now, as I understand, the committee would meet, and the committee would—what would they do, recommend a rights fee to the network, which they accepted or rejected and negotiated a new one?

THE WITNESS: Basically, the committee would recommend what the rights fees would be for the regional and national and transmit that to the network.

THE COURT: But it still had to be acceptable to the network, I would presume?

THE WITNESS: Yes. I don't recall the network ever changing the recommendation.

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[107] Q. Do you know of any year in which the network paid more—no more than the compensation? A. No, the network would adhere to the—what was to be the total dollar and never exceeded the minimum aggregate.

Q. So over the years, the N.C.A.A. pact under the N.C.A.A. contract, the network would be paid the minimum wage paid for the total paid for N.C.A.A. tel— A. That became the minimum, maximum and actual fee, was all one and the same.

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[113] Q. (Mr. Coats, continuing.) Mr. Neinas, you were involved, I take it, in a contract between the C.F.A. and N.B.C, in regard to what would have been the 1981 season? A. That's correct, sir.

Q. Yes, sir? A. No, '82.

Q. The 1982 season, excuse me. There's been a good deal of testimony about that this morning, and I don't want to spend a lot of time on it, but if you would tell the Court, please, briefly, how that contract came into being and what became of it? A. Yes. The C.F.A. had been investigating television football form, and I appointed a committee in June, and the committee made recommendations to the board and at the 1981 C.F.A. meeting, which was early in June, in Dallas, the C.F.A. membership went on record and adopted a resolution to the effect that it did not agree with the interpretation offered by

the N.C.A.A. council under the date of April 17th, indicating that the N.C.A.A. had historical right to control the television rights of all its members.

Secondly, that the C.F.A membership was not accepting the N.C.A.A. football television plan as had been proposed, and the plan had been outlined to the C.F.A. membership, both [114] in terms of writing, as well as presentation by the chairman of the television committee, Mr. Hallock, at the C.F.A's annual meeting.

And the third was that the board of directors of the College Football Association was directed to move with dispatch to determine the salability of possible C.F.A. television plan. A committee was subsequently appointed. The committee proceeded to investigate. Eventually, in July, a meeting of the C.F.A board of directors received appearance by representatives of two of the major television networks. What resulted was a period of negotiation between the National Broadcasting Company and the C.F.A. The outgrowth of which was the development of a four-year contract worth one hundred eighty million dollars over the four-year period, which would have allowed C.F.A. members to have an opportunity to appear on network football—or network television.

Q. Every C.F.A. member? A. Well, the contract was developed in such a manner that every C.F.A. member who chose to participate in the contract, it was not mandatory that they participate in the contract, they could remain members in good standing in the C.F.A. and not participate in the contract, in participating in the contract if they so decided, but the C.F.A. contract would provide a guaranteed one million dollars over the four-year term to each C.F.A. member that elected to participate [115] and also would guarantee that each of the C.F.A members would have a minimum two appearances during this four-year period.

What happened was the C.F.A. membership on August 21st, 1981, voted to ratify the contract that was adopted or was—excuse me, was presented. They did so even though there were threats that institutions involved—getting involved in the C.F.A. football television agreement would be subject to the N.C.A.A.'s enforcement procedure, indicating that such institutions could be subject to penalty, whereby their entire athletic program could be placed on probation and, therefore, none of their athletic teams would be allowed to compete in the national championship competition. Also, it was mentioned that there was the possibility of expulsion.

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[116] Subsequently, some of the C.F.A. member conferences suggested the possibility of a special convention to address the topic of restructuring the N.C.A.A., which had been very important to our members for sometime. The result was a special convention was held and there was some restructuring accomplished at that point in time.

At that time, the N.B.C. network indicated a cutoff date upon which time they must know whether or not there was going to be a sufficient inventory for college football in 1982. Member institutions of the C.F.A. at that time were required to indicate whether or not they would participate, but the N.C.A.A. threat of probation and possible expulsion continued. The end result was there was not a sufficient number of C.F.A. members willing to take the risk of an N.C.A.A. probation [117] that would damage their entire program, so the contract was never implemented.

Q. What relationship did you observe between the N.C.A.A. threats and the number of teams which opted out?
A. In my opinion, it was very substantial, and that was the main cause that the C.F.A. contract was not implemented.

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[118] Q. If you would just generally characterize what the memorandum does and what import it had? A. The memorandum is from Walter Byers and refers to discussions relative to an N.C.A.A. football television plan, and those who would desire to televise on another program. It goes on to state, in essence, "Reports of such a commitment, this would be a commitment to a C.F.A. television package, "will be handled through the regular enforcement procedures of the association, i.e., an official inquiry will be sent to the chief executive officer of such an institution. The inquiry will be expedited since a deliberate institutional decision to violate the conditions and obligations of memberships traditionally considered the most serious kind of violation."

So this was the indication that the enforcement procedure against C.F.A. institutions interested in the C.F.A. agreement would result in expedited enforcement action.

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[125] Q. Do you consider that the N.C.A.A. is a voluntary organization? A. Voluntary, not at the major level. If you are a major athletic—major athletic program, the voluntary aspect of the N.C.A.A. is not there. You must—

Q. By "major"—would you tell us what you mean by "major"? A. The members of the College Football Association, I would classify "major" as Big Ten and Pac Ten and as well as some other universities, having a visible and active athletic program, and you will find, I think, that the C.F.A. membership engages in many sports other than just football with some success.

Q. And it is in all of these areas, is it, that they desire to stay with inside N.C.A.A.? A. Yes, the N.C.A.A. sponsors national championship competition in a number of sports now for women as well as men, and it is good quality competition, and if you want to compete for the national championship, you have to be an N.C.A.A. member to do so.

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[127] Q. All right, sir. Referring now to regular season college athletics, what other areas of media, television, radio, broadcasts, cable, anything else for the—of college sports does N.C.A.A. control? A. The N.C.A.A. controls the media rights to the national championships that the organization, itself, sponsors, but in regular season competition, that rests with the various universities and colleges. The N.C.A.A. does not control football radio, they do not control regular seasons basketball television, they would not control, for example, the television of the wrestling between Oklahoma and Oklahoma State, which is annually shown in this area. Obviously, there are conferences which sponsor championships. Some of those championships are televised either on cable or over the air, as well as various conference championships, so the N.C.A.A.'s sole control in the area of media is football television during the regular season, both over the air and now cable.

* * *

[130] Q. (Mr. Coats, continuing.) Looking at document forty-two, tell the Court, please, how that impacts upon the previous exhibits number seven and forty-one, or how it implements them. A. What it does, it is establishing the ground rules for two ground work schedulings for 1982, '83, '84 and '85 television football series. Your Honor, this is the first time that the N.C.A.A. has made arrangements to show college football on two networks, and what was done was to work out an arrangement whereby they could determine how there could be coordination in the scheduling between A.B.C. and C.B.S. Also, in connection, for example, with the scheduling of games so that the telecast of the two networks—two networks with possibly two exceptions, would not conflict. In other words, the game on A.B.C., if they had what was called the early game would be completed before the C.B.S., on that date, would have—the late game would appear.

And also, there was—recognizing that all college [131] football games may not be of the same caliber, they established

a system whereby networks could determine special dates, and on those dates, feature certain games which could be arranged for in advance, and each network would be given the opportunity for three such special dates.

This was done to—as I say, to work out an arrangement whereby the networks could have—well, as one network official said, "They would draft the dates for selection, plus they have an arrangement whereby they alternate on the special dates."

Q. All right. So that there was some kind of a coin flip involved in this document? A. It was advertised as a coin flip on terms of determining the special dates and who would go first on the first selection of games on other dates during the regular season. Now, if it was an actual coin flip or not, I'm not certain, but there was some process as the network official reported, so that they would draft the dates.

* * *

[132] Q. Mr. Neinas, how does this document affect competition between the networks for individual games? A. Well, virtually eliminates competition because it sets up a pecking order, so there would not be competition between the networks in the selection of games. One network would have first selection on one date, and the other network would have the first selection on the other date.

Q. And on the regular season, Saturdays, is it the import of that document that one television network has control on that date? A. They have control in terms of being able to determine the game they want and also the time slot to televise the game.

Q. And then on that day, then, the other network—how would it work for the other network? A. It would have the remaining time slots, and then would have its selection of the remaining number of games.

Q. And then vice versa, on through the season? A. That's correct.

Q. Would the—does the document contemplate a situation in which the networks would be bidding games against each other for any particular game on a regular season, Saturday for example? A. No, it does not, Mr. Coats, and as a matter of fact [133] at the College Football Association meetings on Friday afternoon when representatives of A.B.C. and C.B.S. appeared—

MR. HARRY: Your Honor, I object, he is talking about a meeting that occurred, and I don't know who was there.

THE COURT: Sustained, unless you can develop that.

MR. COATS: Yes, I understand.

Q. Back to the original question, Mr. Neinas, on the face of the document, itself, is there an opportunity for the networks to come in and bid for games on these different Saturdays? A. No, sir.

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[134] *Cross Examination by Mr. Harry:*

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[138] Q. Now, what is your relationship to the parties in this case? Why are you testifying? A. I am executive director of the College Football Association. Both the Universities of Georgia and Oklahoma are members of C.F.A.

Q. So are you in a sense their association, appearing on their behalf? [139] A. Yes, sir.

• • •

[143] Q. Now, you testified to Mr. Coats' questioning that the minimum aggregate rights fees in these television contracts between the N.C.A.A. and the network were recommended by the N.C.A.A. TV Committee. Was that always true? A. To

the best of my recollection, there was a recommendation from the TV committee to the network. There may have been instances where the network may have recommended it back to the TV committee, but my recall would be that primarily, the recommendation went from the TV committee to the network.

Q. And I think you also testified, and I want to be [144] sure this is in the record for the Court, that A.B.C. determined the rights fees; would you say that? A. Yes.

* * *

[164] Q. And these threats had no effect on Georgia, did they? A. I think Doctor Davison could respond to that much better than I.

Q. I think he already has, Mr. Neinas, and he testified earlier that his institution, Georgia, adhered to the N.B.C. contract. You agree with that, don't you? A. Well, they adhered to it up to the point in time where N.B.C. indicated there wasn't a sufficient inventory to implement the contract.

* * *

[165] Q. Did these threats and coercion have any effect on Oklahoma? A. No.

Q. Now, what did happen, Mr. Neinas? You have testified that the N.B.C. contract failed on, I believe, December 14th, is that right, 1981? A. It was a December date, Mr. Harry. If you have it recorded in front of you, I will accept your word.

Q. Let's say on the fourteenth. I am not certain, but I think that's about right.

What happened then? How did that actually work its way out? Were you involved? A. Yes, sir.

Q. So you were running the C.F.A. office, which was taking the word of the various C.F.A. universities, as whether their decisions would be to adhere to the N.B.C. contract or not? A. That's correct.

Q. Now, would you just tell us, then, what happened? [166] A. The date was established, and I will accept your December 14th date, at which time institutions were to indicate whether or not they wished to participate in the agreement. And when the indications were that there was not going to be sufficient inventory—in the interim, I was in communication with N.B.C., and when it appeared that there was not going to be a sufficient inventory to make the contract feasible, N.B.C. so advised, and we in turn jointly issued a press release to that effect. And then we notified the C.F.A. membership.

Q. Mr. Neinas, I meant to cover in a little more detail of what the universities told you, who told you what, about their—whether they would stay with the contract or— A. Well, the communication between our office and the universities—

Q. Yes. A. —was with different individuals at different universities.

Q. But tell us what some of them told you? A. Well, some of them indicated that they were not going to participate in the N.C.A.A., and they were so notifying us on the specified date.

Q. And I assume now you wouldn't know how many? A. How many told us "no," or how many told us "yes"?

Q. How many told you "no." [167] A. I don't think I could, at this point.

Q. Fine. I wouldn't expect you to. That's a long time ago.

And others told you that they had reached the decision that they would adhere to the N.B.C. contract? A. Yes, sir.

Q. And do you recall how many of them there were? A. No, sir. There were some conditional nonacceptances Mr. Harry.

Q. I see. And who made the judgment that the balance of the affirmative ones was insufficient to make a viable inventory for the N.B.C. contract? A. Arthur Watson, the president of N.B.C. sports.

* * *

[169] Q. I understand. Mr. Neinas, on the threats and coercion, there was a temporary restraining order entered in this case on September 8th, 1981, when it was filed, and I am sure you are familiar with all of that? A. Yes, sir.

Q. And I want to be very clear on one thing for the Court: was there any threat or coercion by the N.C.A.A. against C.F.A. members after the temporary restraining order was entered? A. Against any N.C.A.A.—

Q. Against any C.F.A. member? [170] A. I can't cite one, sir.

* * *

[177] Q. So that it is your testimony that it is not possible with any group of colleges and universities to really establish an organization separate from the N.C.A.A.? A. No, I would not wish to indicate that. It's possible. But I think that you also have to look at the practicalities involved.

Q. Now, did you, yourself, at some point in time, draw up a plan for a sports association that would perform the functions of the N.C.A.A.? A. I was requested to develop a draft of something that became—I forget what its title is. But it was a sports association.

Q. It was called the "University Sports Association"? A. That's it, U.S.A.; had a patriotic ring.

Q. And what was the occasion for your drawing up that plan? A. My recollection was that Chairman Davison, Chairman of the Board Fred Davison, and a conference commissioner, asked if it would be feasible to even draft an organizational structure.

[178] Q. And did Chairman Davison indicate anything more than that he wanted to know if it would be feasible to draw it up? A. He had no more than, I would say, the normal curiosity.

Q. And did you then draw up this three-page outline of a structure for a national sports organization with the chart attached? A. Is it an exhibit, sir?

Q. Yes. Let me show you. Court's copy is GP. I will tender it in a moment, and your copy, Mr. Neinas, is here. And it's identified as GP. Would you state, sir, what that is? A. Structure for national sports organization.

Q. And is that the one you drew up? A. Yes, sir.

Q. Pursuant to Doctor Davison's request? A. Yes, sir.

Q. And let's look at the first page, which is the cover letter. Did you send this document to the entire board of directors of C.F.A? A. I must have. That's what it says, so I am sure I did.

Q. Then it says at the end, "Carbon copies to selected individuals," does it not? [179] A. Yes, sir.

Q. And who were they? A. I would assume—my recollection would be some conference commissioners and others, but who the others would be, I could not completely identify at this moment.

* * *

[182] Q. And to put it in perspective for the Court, is that the convention that followed the September meetings and discussions about restructuring, and it was a widely talked about matter in the N.C.A.A. and C.F.A.? A. Yes. There were two basic points of discussion. One was television rights, and the other was restructure.

Q. Could you explain to the Court—excuse me, I didn't mean to interrupt, but I think it is important to tell him what "restructuring" is. A. As I indicated earlier, Judge, there's nine hundred six members, at least, give or take a few. And for

purposes of legislation and competition, there are divisions; there is division one, division two, and division three. Division one is made up primarily of what you call "major athletic programs" of colleges and universities. Division two would be the intermediate division. Three would be primarily some of the smaller, liberal arts colleges.

Within the N.C.A.A. constitution—well, I should say within the N.C.A.A. bylaws, there are some bylaws which can be voted upon by each division. In addition, the N.C.A.A. sponsors championship competition in all three divisions.

And the group which I represent, the College Football Association, was actually formed—one of the major reasons for its formation was to get a restructuring, so that those [183] who are the major football program at least would have a majority vote on what was going to affect their programs.

There had been attempts to restructure in 1976, '77, and '78, and no meaningful restructuring had been accomplished. And, hence, they did call a special convention in the summer of 1981, again for the purpose of restructuring.

So what did happen was that different criteria was developed as it relates to what we know as "division one A" and "one double A." And I will try to clarify that for you.

Because division one can encompass universities that do not play football, but they could be very good in basketball, like Georgetown, then you have, only for football, division one A and division one double A. The one A institutions are those that you would consider more prominent in the sport of football; one double A would be institutions that would be slightly below those that are in one A.

And what happened as a result of the restructuring convention in December, was to reduce the size of one A from one hundred thirty-seven, I think it is, down to approximately ninety-seven.

Q. Now, just to put that in perspective, as the discussions were going on and C.F.A. was considering its situation, there were some approximately a hundred and thirty-five members in division one A, which was the football classification? [184] A. Correct.

Q. And they desired a restructuring that would reduce that number to—in division one A, so it would be fewer members? A. They wanted a more stringent criteria to bring together those that have a more similar-type program.

Q. I understand. Now, was that restructuring accomplished at the special convention in Saint Louis, early in December, 1981? A. There was a restructuring proposal adopted by—

Q. And what was the effect on the membership of division one A? A. It was reduced to approximately ninety-seven.

Q. And did that reduction occur by increasing the requirements for becoming a member of one A? A. Basically what it did, it removed a loophole.

Q. Which was? A. Which allowed some to be in one A.

Q. And the loophole was—would you tell the Court? A. There is a football-related criteria based upon stadium size, average attendance, what is termed "strength of schedule." In other words, the quality of teams that you normally play. And that had been placed into the N.C.A.A. bylaws, I think in 1978.

But, at the same time, there was an amendment adopted to [185] the effect that if you sponsored twelve intercollegiate sports, you could still be one A in football, even though you may not meet the football-related criteria—if I make myself clear.

And the basic thrust of what happened in December was to remove that particular amendment, so that then you would have to meet the test of the football-related criteria to see where you stood in a football-legislated division.

* * *

[222] Q. And was it in the thinking of the C.F.A. and its T.V. committee that its television plan and activities could be used as leverage to influence the N.C.A.A. on various matters? A. There is no question but what the feeling was that there needed to be some changes within the N.C.A.A. and that the opportunity to become involved in television might get the N.C.A.A.'s attention to consider some changes.

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[230] *Redirect Examination by Mr. Coats:*

Q. Mr. Neinas, you have testified about two provisions in the contracts between N.C.A.A. and the carrying network establishing a minimum aggregate fee. I want to ask you in the history of N.C.A.A. has there ever been any deviation [231] from, or a payment in excess, by the network in excess of that minimum aggregate fee? A. No, sir.

Q. So no matter what it is called there was also the maximum and actual amount paid? A. Yes, sir.

* * *

[233] Q. All right, sir. Now, in the context of the actual situation where a network would notify a host institution that their game with such and such an institution would be on television or was selected to be televised, did the host institution or even the visiting institution have any alternative as to another television source? A. No, sir, they did not.

Q. So they are dealing with the network — they could deal with that network or not be on television at all, correct? A. That is correct.

* * *

[240] Q. Laying aside those limitations on appearances and laying aside the compensation, is there any other necessity for N.C.A.A. to be the bargaining agent for all the television football schools in the country? A. I would think that the example cited on basketball would indicate that there does not have to be one exclusive bargaining agent. I go back to the point that the C.F.A.'s involvement in television to create some type of competitive atmosphere certainly spurred the N.C.A.A. on to change some [241] of its principles to make the plan not only more attractive to the networks but I would have to say that it probably makes the possibility that it might be more attractive to the viewers, as well. I don't believe that would have occurred if the N.C.A.A. had not become involved in television.

Q. We talked a little bit about basketball and basketball, as we have indicated, the teams sometimes form together a conference to sell their television rights — sometimes they do it individually, sometimes they do it in other groups, would that be a fair assumption? A. Yes, sir.

Q. Is that — excuse me. Is that, in fact, the way it works? A. It does work that way.

Q. And what about the effect on the years on the basketball project, and what would be the same effect on football if, indeed, this bargaining agency and the controls that the N.C.A.A. asserts were set aside? A. Well, college basketball is definitely increased in its popularity, not only is attendance increased but the amount of college basketball on television has increased and also the revenue generated by college basketball on television has increased substantially.

I gave two examples of the Big Eight and the Atlantic Coast Conference. Now the Big Eight went to a [242] midweek game. In other words, the Big Eight game was televised on Wednesday and in 1977 the average attendance at Big Eight games was seventy-five hundred per game. In 1981 the average attendance was eighty-six hundred a game. So the attendance actually increased. The revenue for basketball television increased and the amount of exposures increased.

One cannot get a ticket to Atlantic Coast Conference basketball games. They are sold out, and yet that conference has increased not only the number of games it televises, but the revenue to the Atlantic Coast Conference members has increased remarkably over the last ten years.

There is no question but what the popularity of college basketball has been enhanced by the exposure. And, interestingly enough, I think that one of the beneficiaries has been the N.C.A.A. basketball tournament, which is also increased substantially in its prestige and exposure.

When I was with the N.C.A.A. in the early sixties, we did not have a national network. The television rights to the N.C.A.A. basketball tournament were sold more or less on an individual station basis, and then a gentleman purchased the rights, an independent. Subsequently, the games were placed on N.B.C. Eventually the games started to get prime time exposure, and this last basketball tournament, televised by C.B.S. under a three-year agreement for forty-eight million dollars for the N.C.A.A. basketball tournament, [243] which is obviously enhanced by the exposure and prestige of now having its championship game televised in prime time.

Q. All right. So, if the court were to set aside this bargaining and the exclusive arrangement that N.C.A.A. has you do not forsee for college football the destruction of the system? A. You can still impose some regulations, but you do not have to have one sole bargaining agent.

Again, I go back to the point I think the C.F.A.'s involvement in college football television tends to show the competition is beneficial.

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[266] **CHARLES NEINAS**

was recalled as a witness, and having been previously duly sworn, testified further upon his oath as follows, to-wit:

Redirect Examination by Mr. Coats:

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Q. Please tell the Court where and how you learned that and what they are. A. The minimum aggregate fee, as expressed in the contract, remains the networks have developed what they [267] call the incentive fee to encourage universities to move either the date of the game or the venue of the game, and the indication in A.B.C. is that they will pay two hundred fifty thousand dollars for that move and as a result there has

been a reduction, or will be a reduction, in the regional game rights fees, but that the minimum aggregate, as listed in the contract, remain unchanged.

The two hundred fifty thousand dollars does not come on top of the minimum aggregate fee.

* * *

JAMES C. KOCH

[270] was called as a witness by the Plaintiffs, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Muchmore:

[271] Q. Would you state for the Court your name and address, please? A. James C. Koch, spelled K-o-c-h.

Q. Where do you live, Doctor Koch? A. I live at 3201 West Petty Road in Muncie, Indiana.

Q. What is your current position, Doctor Koch? I am professor of economics and vice president for academic affairs at Ball State University at Muncie.

Q. And that is in Indiana? A. Yes.

Q. Would you tell the Court just a little bit about Ball State University and about your responsibilities there? A. Ball State University is a publicly assisted institution. The enrollment this past fall was eighteen thousand five hundred students. It offers academic programs ranging from associate two-year degree programs through about twenty doctoral programs as provost and vice president for academic affairs. I am the chief academic officer of the institution and thus am responsible for the academic programs there.

Q. What are your academic degrees, Doctor Koch, and where did you receive them and when? A. I received a Bachelor of Arts degree in economics in 1964 from Illinois State University and received my Ph.D. degree in economics in 1968 from Northwestern University.

[272] Q. And what other — briefly, what other positions have you had with what other schools? A. From 1967 through 1976 I was in the Department of Economics at Illinois State University and progressed from assistant to full professor.

From 1972 to 1978 I was chairman of the Department of Economics there. During that time period I also visited at terms at California State University at Los Angeles, at Brown University at Providence, Rhode Island, and University of Grenoble, France.

Q. And within the area of economics generally, do you have — do you personally have specific academic specialties? A. Yes. I would consider myself to have three major specialties. The first is industrial organization in pricing, and that is a specialty that deals with the behavior of business firms with the market structures in which firms operate and compete and how they set prices.

Another specialty is labor economics and human capital and relates to how labor markets operate, how wages are determined, the costs and benefits of education and the like.

The third specialty is applied econometrics and deals with the application of statistics and mathematics to economic problems and uses those kinds of tools to help explain and [273] predict phenomena.

Q. And you have been published, Doctor Koch? A. Yes, I have.

Q. Without getting into all of it, have you had books published? A. Yes.

Q. And what have those been? A. I have published four books. One is entitled *Industrial Organization In Prices.* It's now in the second edition. Prentice-Hall is the publisher.

Q. Is that used in schools or universities? A. Yes. In fact, it's used at—from time to time at the University of Oklahoma.

Another book is entitled *Micro-Economic Theory and Applications*, published by Little-Brown, 1976.

Another is entitled *The Economics of Affirmative Action*, published by D. C. Heath-Lexington in 1976.

Another is entitled *An Introduction to Mathematical Economics*, which was published by Houghton Mifflin in 1980.

Q. And about how many articles would you say you had published in various journals relating to economics? A. Approximately forty or fifty.

Q. Have you, in the time that you have been working in the area of economics, been giving any particular degree of effort or interest to the area of intercollegiate athletics? [274] A. Yes, I have. I have had a considerable interest there.

First of all, I would say I am a fan. But, second of all, as an economist I have done a good deal of research into the economics of athletics and specifically the economics of intercollegiate athletics, and I have done a good deal of reading in the area, and in general would regard that as one of the areas where I have some interest and competence.

Q. Have you been published specifically in the area of intercollegiate—or I should say, the economics of intercollegiate athletics? A. Yes.

Q. Would you tell the Court what those publications have been? A. Yes. In 1971 I published an article entitled *The Economics of Big Time Intercollegiate Athletics* in the *Social Science Quarterly*.

In 1973 I published an article entitled *A Troubled Cartel —The N.C.A.A., in Law and Contemporary Problems*.

In 1974 I contributed an article to a monograph that came as a result of a conference that was sponsored by the National Football League Players Association.

My contribution to that related to oligopaly theory in sports.

Finally, in 1978, a College Socialized, and I wrote [275] it on a *Socio-Economic Analysis of Intercollegiate Athletics of the N.C.A.A.* That particular article was published in a journal known as the *American Journal of Economics and Sociology.*

Currently, also with two other college economists, have underway a book entitled *The Economics of Intercollegiate Athletics* and D. C. Heath-Lexington will be the publisher of that.

* * *

[279] Q. Well, in applying the economic theory that you refer to, and looking at models as you described it, and, in particular utilizing your expertise that you have described, your area of expertise in industrial organization, I think you described it, to the area of intercollegiate athletics and to the N.C.A.A., have you reached a conclusion concerning the structure and the organization of intercollegiate athletics? A. I have.

Q. And what conclusion, generally, have you reached? A. Well, my conclusions is that the model that explains best that which has been happening in intercollegiate athletics [280] is a model of cartelization, which is to say that to assume that the N.C.A.A. is a cartel and behaves as such.

Q. Would you—do you use the words "cartel" and "monopoly" in any different sense as an economist, or are they interchangeable, or do they have different flavors? A. Well, a cartel is an organization of firms or individuals who get together to agree on items of joint interest. A monopoly is simply a sole or single seller of a given goods or service.

* * *

[282] Q. All right. In the area of college athletics, then, what are the inputs? A. Well, among the major inputs would be the athletes, the coaches, the stadiums, and things that go into, for example, producing intercollegiate athletics football.

Q. And what are the outputs in intercollegiate athletics? A. Well, the major output that we are concerned with here is intercollegiate football and intercollegiate football is an output, which is produced by combining various sets of inputs and it's an output that is sold.

There is also, however, a further output that is really a derived kind of output, derived from the demand that fans have to attend football games and that is the output of television. There is a key demand to televise intercollegiate football games. That is yet another output that results from the combination of inputs that are used.

Q. All right. As to input, you have referred to the fact that there are restrictions on the input in collegiate sports. Very briefly, what are you referring to on that? A. Well, the N.C.A.A. regulates, for example, the number of athletes that a given university can employ in a given sport. They regulate how much these people can [283] be paid. They regulate how often these people can be used. They regulate the number of coaches that can be hired and so forth. These are all input restrictions.

Q. Now, specifically, though, as you have suggested and we will be focusing on the area of output here, what restrictions are you referring to in the area of output in college football? A. Well, on the output side of the market the N.C.A.A. fixes prices. Testimony that I have heard here and the exhibits that I have read suggest strongly that the N.C.A.A. fixes the prices of television rights. In terms of the quantity of output, the N.C.A.A. regulates, for example, how many games that a university can play, sometimes where they can play them, and certainly when they can play them. The N.C.A.A. regulates the televising of those games.

So on the output side, the N.C.A.A. is engaging in some very significant economic restrictions that are not even customary of some of our more effective cartels elsewhere in the world.

Q. Well, you have stated that the N.C.A.A., the model that fits the N.C.A.A.'s behavior, is that of cartelization. Is it your testimony that that is the case when we are looking at output? A. Yes.

[284] Q. Or would you explain for the Court in what manner the output restrictions that you have referred to are associated by you with cartelization? A. Let me try to provide a couple of examples of other cartels in action, and then compare those to the N.C.A.A.

Consider the Organization of Petroleum Exporting Countries, O.P.E.C., as we call it. O.P.E.C. sets the price of oil, for example, at thirty-four dollars a barrel or whatever. They have also, from time to time, attempted to control the output of oil, although not very successfully.

One could look at another cartel, the International Air Transport Association, I.A.T.A. The I.A.T.A. traditionally controlled transatlantic airplane routes, and would set prices on those routes and indicate how often someone could utilize one of those routes. Now the I.A.T.A. several years ago was very powerful because they succeeded in denying routes to firms that didn't obey their price discipline. Specificially, consider Icelandic Airlines, which was forced to fly only from the United States to Iceland, to either Copenhagen or Luxembourg and could not fly in to Frankfort or Paris and the reason for that was simply that they refused to fix prices at the higher level that the I.A.T.A. had specified.

Those are examples of cartels' attempts to fix prices in quantities, and this is, from an economist's viewpoint, precisely what the N.C.A.A. is doing when it attempts to—[285] in fact, does—fix the fee that is paid for television for a regional game or national game, or when it restricts the number of television appearances or when it indicates, for example, in the television contract relative to exception, precisely when and where and how and under what circumstances one could televise a specific game and a specific situation.

* * *

Q. Well, would you give the Court sort of a definition or an idea what an economist means by "price fixing"? A. Well, by "price fixing," an economist means a price that is fixed artificially and which is not responsive to supply and demand forces in the market place.

[286] Q. And what specifically about intercollegiate athletics or specifically football leads you to a conclusion as to whether or whether or not the price is being fixed? A. Well, one observes in intercollegiate football televising that the same rights fees are being paid repeatedly for first one fee for regional games and another fee for a national game, regardless of what the apparent supply and demand circumstances have been.

* * *

[288] Q. Apart from the game or games between the big teams that we have heard some testimony about, have you also formed [289] any conclusion as to the number of games among teams that don't have a national following that would be available in a free market situation and the geographical range that you would expect those games to be available in? A. Yes, I have.

Q. Would you give that opinion, please? A. Well, it's my opinion that if a free market operated in the market for intercollegiate television of football, that there would be substantially more regional and even more local games being televised than there are currently. I can take a specific example from my home state of Indiana.

I am at Ball State University, which until recently was a division one-A institution, although now is a division one-AA institution in terms of intercollegiate football. When Ball State plays Indiana State, that is a hotly contested game in an intrastate sense. That is a prime example of the type of game that probably would be televised. For example, when Ball State is playing Indiana State at Terre Haute, Indiana, that

a popular game to be televised in the Muncie area, and, vice versa, in Terre Haute when the game happens to be in Muncie.

I think there are numerous examples of those regional and local contests that would be very attractive to television stations and that television watchers, the consumers, would [290] be very pleased if those were televised.

* * *

[293] Q. And do all cartels have that effective means available to them? A. No, all cartels do not. If one takes the example of O.P.E.C., O.P.E.C. attempts to control the price of oil, but they cannot stop people from producing oil. If I am in Venezuela and I don't want to follow the O.P.E.C. price, I can go ahead and produce and sell my oil and O.P.E.C. can't stop me.

Q. All right. Would you relate that, please, to the N.C.A.A. as to first what the mechanism is, if there is one, and, second, whether as cartels go, you view it as an effective mechanism? A. Well, with respect to the N.C.A.A., I observed that by taking the rights, the property rights to televising and installing those by rule and regulation as exclusive rights of the N.C.A.A., that they have first, by rule and regulation, made it impossible for anyone else to sell rights to intercollegiate television, live performances, for football.

So, first of all, rule and regulation does that but rule and regulation is made effective by the threat and the actuality of N.C.A.A. enforcement.

Q. Now, let me stop you right now. When you say [294] "threat," do you mean it's necessary that someone come out and say words that we would commonly consider in every day speech as "threats," is that required? A. No. It's rather in many cases simply a perception of what might happen in the financial losses that might be imposed on an institution if they don't follow the N.C.A.A. outline.

Q. Well, continue here with the situation in the N.C.A.A. in that respect. A. The N.C.A.A. is able to impose very, very significant financial losses on an institution that does not follow its particular rules and regulations in this regard.

Q. Be specific. A. Specifically, they can prevent an institution from appearing on television. I have read recently of penalties imposed on the University of Southern California and that for a specific football game.

For example, if U.S.C. were to again play Oklahoma University while they were on probation and if they could not appear on television, that the cost of that might be upwards to a million dollars, depending upon the value of the contract and so forth in that particular year.

So that's a very significant penalty.

Further, however, the N.C.A.A. can, by placing an institution on probation or, in fact, even expelling them, [295] prevent not only the athletes who compete for that institution and that sport from competing for N.C.A.A. championships, but they can impose sanctions upon the athletes in other sports so that an athlete in gymnastics or baseball or hockey or basketball would be unable to compete for a national championship.

Now, that, too, is a financial penalty because the inability to compete in an N.C.A.A. basketball championship results in one not being able to compete for very significant financial rewards. It also results in one not being able to recruit good athletes and it also results in loss of exposure and perhaps some program or lack of a program out in the community and an inability to recruit students.

Q. That affects your input? A. Yes.

Q. All right. Now, would you please evaluate the effectiveness of this enforcement means as compared with that of other cartels? A. Well, I would judge the N.C.A.A.'s

enforcement in the area of football to have been very, very successful. One basis for that is to simply observe that in the entire history of the contracts, and apparently there's been no deviation at all from that minimum aggregate fee, that would be very, very unusual. For example, it does not occur in O.P.E.C. where there is constant price chiseling, where there [296] is constant give and take and some cheating going on. That doesn't seem to have been the case with N.C.A.A.

I could also observe that when a rival—say not a rival—I will rephrase that.

When another institution or another organization, such as the College Football Association, talked about developing a television contract and, in fact, negotiated a possible one with N.B.C., that the possibilities of expulsion from the N.C.A.A., the possibility of severe financial penalties if they went through with that, was sufficient to deter them from adopting that contract.

Q. Have you read the exhibits and heard the testimony about what the N.C.A.A.'s reaction to the C.F.A. proposal was? A. Yes, I have.

Q. And can you state as an economist whether that is one which is predictable or fits your models or whatever your phraseology would be? A. Well, nearly any cartel is unhappy when competition arises, and the N.C.A.A. has been predictably very, very unhappy when people attempt to compete with it or when it is forced to get out into the competitive market place.

Q. Has the manner of response been one that you, as an economist, are used to seeing in this situation? A. Very predictable.

[297] Q. And you have stated more or less empirically that the enforcement process has been effective. As a matter of pure analysis, though, is it one that you would anticipate to be

effective? A. Yes, given the various sanctions and financial penalties that the N.C.A.A. can impose, one would predict that it could be rather successful.

Q. What about the option of the individual member to withdraw from the organization, the N.C.A.A.? A. Well, I don't, as an economist, view that as a viable option. I don't believe that the N.C.A.A. is, from an economic standpoint, a voluntary organization. Doctor Davison, the president of the University of Georgia, suggested that it was the only show in town, if one wanted to be a major athletic power, or even a major athletic participant. I also would cite what I think to be a very telling comment made by C. Peter McGrath, who was a vice president of the University of Minnesota, when he was testifying before the U.S. House of Representatives hearing in 1978. He suggested that membership in the N.C.A.A. was no more voluntary than payments to the Internal Revenue Service were each year, in fact, income tax and I think that's apt.

* * *

[300] Q. What determination have you made, then, as to what the market that is relevant in that determination is? A. Well, it is my professional opinion that the relevant market here is—

Q. Is that an economic term, by the way, "relevant market"? A. Yes, it is.

Q. Proceed. A. —that the relevant economic market here is intercollegiate football television and that one can differentiate that particular market from other markets that exist on the [301] basis of a lack of substitutability between that to some degree or another, and other possibilities, other goods and services and other kinds of television that might possibly appear in that.

Q. And what is your—at least your judgment as to the substitutability? A. Well, I can perhaps best answer that by giving you an example.

It would be my professional opinion, based upon ratings information that I have seen, that the substitutability between a Saturday afternoon telecast of, let's say an O.U.-Nebraska football game, and a Saturday morning Bullwinkle cartoon would be very small.

Q. When you say the substitutability of those two programs is very small, that's a way of saying what? A. That the two are not in the same economic market.

Q. And are you talking now from the viewpoint of the viewer or the advertiser? A. Well, I am talking about the viewpoint of the advertiser, but the advertiser derives his demand from these things from what the viewer says that he wants to see.

Q. And is that what you then referred to as a derived demand? A. Yes.

Q. What is a derived demand? [302] A. The derived demand here is a demand which one has because of something preceding it and in this case the demand of advertisers for television advertising time is a function of primarily what kind of people and how many people they believe to be watching a particular program. So the demand for advertising time is primarily a function of the television watching that individual's undertaking.

Q. And that is based on such information relating to ratings and the like, as you have seen? A. Yes.

Q. And have you — has it been your roll in the — in this presentation to make truly detailed analysis as to those kinds of numbers? A. It has not.

Q. But have you observed enough to be able to form with some confidence the conclusion that you have given? A. Yes, I might give one example here.

I have seen ratings information that suggests that, in fact, directly indicates that the price of a minute of prime Saturday

afternoon television time, which is used for intercollegiate football, is about two and a half times the price which one must pay for advertising anything else.

Q. Are you talking about the overall price or the price for each thousand viewers that you have? A. We are talking about per thousand viewers.

[303] Q. Would you expect to see that if they were competing in the same market? A. No.

Q. Why not? A. Well, there's a great deal of lack of substitutability here. If two goods are high substitutable for each other, more often than not their characteristics will be similar and their price will be in the same neighborhood, but that is not the case here.

* * *

[304] Q. What conclusion have you reached as to whether the N.C.A.A. has and is exercising monopoly power in the area of college football television? A. My conclusion is definitely that the N.C.A.A. is exercising monopoly power; that it is a monopolist in the area of intercollegiate football televising, and that it is not behaving in any sense in the way that one would expect if we had a free market.

Q. Well, generally what leads you to the conclusion that monopoly power is being exercised here? A. Basically two kinds of considerations.

First, the price results that I see, rigid prices, prices that are not responsive to supply and demand influences. I would again cite the example of the O.U.-U.S.C. game versus the Appalachian State versus The Citadel game. That's very strong evidence that the desires of football consumers out [305] there in terms of who's watching television are not being followed and, hence, that the market is being stymied and, in fact, being rigged.

The other kind of major source of support for my conclusion would be what's happening in the output side of the

market, relative to the number of games being televised and the selection of games, when they are being televised, and so forth.

* * *

[306] Q. All right. What are the barriers to—first, we—well, what are the barriers to entry that you perceive in the area of the sale of college football? [307] A. Well, the primary written barrier relates to the assignment by the N.C.A.A. to itself of the property rights for televising football contests and that is part of the rule and regulation of the organization and individuals who do not choose to follow that can be significantly penalized. So the second part of this, then, are the penalties that can be assigned. They are very significant. Financially they are very large.

So not only is there rule and regulation, but there are very significant penalties and even threats of penalties that can be assigned that would make the barrier to entry very, very effective.

Q. Well, in comparison with the situation that you have seen in the analysis of other monopolies, how effective is the barrier to entry that you have just described in the N.C.A.A.? A. I would judge professionally this particular barrier to entry to be very, very large and significant and has been very successful. I would, again, compare this particular cartel to other cartels, such as, for example, O.P.E.C. O.P.E.C. has not been successful in maintaining the price of oil.

* * *

[308] Q. All right. Go ahead. You were stating how the barriers to entry to N.C.A.A. compare as barriers to entry that good in cartels, generally. A. I think the barriers to entry that the N.C.A.A. has established in terms of rules and regulations and in terms of its conduct, are very large and significant. They have been very successful and that those are larger than nearly any other cartel and more successful than nearly any other cartel that I could mention.

* * *

[313] Q. Now, second argument, or maybe it was chronologically first, and I may have mislead you, but is the question as to whether the restrictions on output, as you put it, on the amount of college television that is made available, does that have an effect on increasing the attendance, the live [314] gate attendance as we have referred to it at the games?

First, I guess I better ask you, from your analysis and from your observations, do you accept that argument factually? A. I do not.

Q. And why not? A. Well, one of the reasons that I do not accept the argument that televising football games could hurt football attendance at some institutions is that I observe in some other sports that has not been the case. We have heard testimony this morning from Mr. Neinas concerning what has been true in basektball attendance and so forth, and so I don't think that it necessarily follows that that would be the case at all.

I also have some additional experience on this. One, I have seen various regression results with respect to football attendance at division one-A institutions that suggested that the attendance if favorably influenced by television appearances.

* * *

[316] Q. Would you tell the Court about that, please. A. Earlier I mentioned very briefly an experience that I had at Illinois State University during my time there as an economist. I had a defensive end on the team in my economics class and he was an honor student in economics and we asked the question as part of his senior thesis, "What [317] are the determinants of football attendance at Illinois State?"

Q. Now, before you go on, is Illinois State in the big time ranks in college football, or not? A. They were division one-A until very recently and they are now in division one double A, and a member of Missouri Valley Conference and Missouri Valley Conference—most of the teams are division one double A.

* * *

[319] Q. All right. Would you tell the Court, in whatever detail is required, what you did, what kind of data you gathered and what kind of econometric functions you performed regarding that to this date? A. What I was attempting to explain was football attendance at Illinois State and I gathered data over about fifteen years and then attempted to explain football attendance at their games on the basis of the price of their tickets, how successful the Illinois State team was in terms of win-loss [320] percentile, the opponent who they were playing, and we went back and looked at the local newspaper to determine what the weather was on those particular days, whether it was raining, what the temperature was, and so forth. We examined the sports pages to attempt to determine whether or not there was a really big national game on that particular day that would gather a lot of interest.

Also, since University of Illinois is only fifty miles away, we entered a variable which recognized whether or not the University of Illinois had a home game.

Q. Is that a school of C.F.A. dimension? A. Yes.

Q. They are not a member, but that is within that qualification, are they not? A. Yes.

Q. Proceed. A. The results of the analysis suggested that doubt—significant predictor of Illinois State football attendance was whether or not they had a good team, whether they were winning football games, and price had some influence. Also who they were playing was important, but whether or not they were playing the game in the evening was not important. This suggested they could play in the day very directly because the variables that were reflecting whether or not there was a big time football game on during the afternoon, or whether [321] the University of Illinois was at home were simply not significant.

Those particular variables didn't tell anything about Illinois State football attendance.

Our conclusion was that—

Q. What about the effect of television? A. The effect of television variable was zero. Whether or not there was a big time game on that Saturday afternoon was simply not a significant determinant of Illinois State football attendance.

Q. What did you conclude from that? A. The conclusion was that people who attend Illinois State University football games and at that time during most of the time of this analysis it was a division two institution and in that regard they did attend for reasons that are quite different than the reasons that one might attend, let's say, an O.U.-Nebraska game or U.S.C. versus Oklahoma; that they attend because they have local interest, they probably know the players and coaches very directly, that they have an attachment to the institution and they would like to see live football, but yet not have to travel fifty or a hundred miles, or whatever range of miles, to go to the game.

Q. Based on your study, did you make a recommendation to the school and the team as to when they might play their games? [322] A. Yes. We met with the athletic director, who had been very gracious to us in supplying a lot of data, and showed him the results and partially as a result of this, they changed and, in fact, currently now most of their games are during the afternoon.

• • •

Q. Let me ask you as an economist and analyzing the situation here as to what you view the impact or the significance of the new contracts on the overall structure and practice that you have described here? A. From an economist's standpoint, there seems to be very little difference between the new contracts and the old contracts. The old contracts talk about freely negotiating [323] fees and the likes. So do the new contracts.

Under the old contracts there was — from an economist's standpoint — price fixing and no competition. There is nothing in the new contract that I can see that would make that any different.

Q. Do you see any evidence in the contracts and the ground rules and the behavior of the competitive situation as far as bidding between the two networks is going to be significant? A. No, and, in fact, I would go further than that and say that as I have read those contracts, while I am not an expert in television contracts, it does appear to me that the contracts go out of their way to reduce, if not eliminate, competition between the two networks.

Q. Now, sir, as to — what, then, just briefly, would you summarize for the Court very briefly your conclusion as to whether then the situation under the new contracts, as you view it, as an economist views it, to be a change? A. I don't see any substantial change in the new contract at all.

• • •

Cross Examination by Mr. Harry:

• • •

[342] Q. Now, has the N.C.A.A. television football plan been essentially similar in form, let's say since 1970? A. I believe that generally to be the case, although I would not want to say that that were true on every specific instance.

Q. I want to look at these three articles that you testified about on your direct examination, Doctor Koch, this morning.

The first one comes from the Economics of Big Time [343] Intercollegiate Athletics written by you while you were at Illinois State in 1971, is that not correct? A. Yes.

• • •

Q. I am going to read a statement at the bottom of two fifty-one, Doctor Koch, and ask you about this.

"Since all teams cannot simultaneously have winning seasons, it is intelligent policy for the cartel either to require sharing of net revenues among all university firms, winners and losers alike, or to promote equality of compensation." That is essentially your view, is it not? A. That is a view of what I would do if I were a cartel and typing to maximize the benefit to the cartel. It doesn't necessarily imply what I think is a good policy as an economist.

Q. But you do think that the attractive power of football to either live attendance or television viewing requires competitive balance among the teams so the games are good? A. Competitive balance is necessary in any league if [344] it is to be attractive to fans.

Q. And, Doctor Koch, in your other article The N.C.A.A. Cartel—A Troubled Cartel In The Law and Contemporary Problems that you testified about, I think that was written in the mid-seventies, wasn't it? A. Yes, sir, 1973, I believe.

Q. And I want to read from a hundred and thirty-seven there: "Competition is an indispensible input to the success of intercollegiate athletics, and when such an ingredient is absent, spectators lose interest in the game in question," correct? A. Yes, sir.

Q. "It is in the best interest to the N.C.A.A. and its component members to strive by regulation and enforcement to make competition reasonably equal among members that choose to compete with each other," correct? A. I agree.

* * *

[348] Q. Did you perform any statistical or empirical studies in your work in this case? A. For this particular case, no.

* * *

[373] DEPOSITION OF JAMES R. SPENCE, JR.

MR. MUCHMORE: We will be reading from the deposition of

— will read deposition of A.B.C. Sports, Inc., by James R. Spence, Junior, which was taken on February 17th, 1982.

THE COURT: I'm sorry, give me that date again.

MR. MUCHMORE: February 17th, 1982, at the office of A.B.C. Sports, Inc.

* * *

"BY MR. COATS:

"Q. State your name for the record, please? [374] "A. James R. Spence, Jr.

"Q. Mr. Spence, what is your business or profession? "A. I'm senior vice president of A.B.C. Sports, Incorporated.

"Q. How long have you been in that capacity? "A. Since January, 1978.

"Q. What was your work prior to that time? "A. I was vice president in charge of program planning for A.B.C. Sports immediately prior thereto.

"Q. For what period of time? "A. From the fall of 1970 up to January of '78."

* * *

"Q. How long have you been involved in the televising of N.C.A.A. college football games? "A. It depends on what you mean by 'involved.' [375] In a management executive capacity, since the fall of 1970."

(Page 9, line 6 through page 24, line 17).

"Q. Since 1970, generally what has been your involvement and your experience with the N.C.A.A. telecasting of football games? "A. Well, the primary role that I have fulfilled since then is as a part of the group that is involved in the scheduling of our telecasts. My role changed a little bit come 1978; but, from '70 to '78, I was administratively involved in the scheduling of telecasts.

Since then, my responsibilities have increased, and I am involved both administratively and from a production standpoint.

"Q. Have you been involved in the negotiations of the contract with the N.C.A.A. during that period of time from 1970 to the present date? "A. Yes."

"Q. Mr. Spence, let me hand you what has been marked for identification as Plaintiffs' Exhibit seven and I ask you to review that briefly and tell me what it is. "A. This is the agreement between A.B.C. Sports and the N.C.A.A. covering the 1982 through 1985 seasons.

"Q. Can you tell us when that document was executed? [376] A. Yes.

"Q. When, please? "A. February 10, 1982.

"Q. The copy that I have given you there, as part of Plantiffs' Exhibit Seven, as typed at the end of it, has your name with a signature symbol, indicating that at some time you have signed it. Is that so? "A. Yes, it is.

"Q. Do you know whether that contract has been signed by anyone for N.C.A.A.? "A. I do not know that.

"Q. Have you received back from them a signed copy? "A. I don't believe we have, no.

"Q. As far as you know, is that contract in full force and effect? "A. Yes.

"Q. Have you had any conversation with anyone at N.C.A.A. in regard to when the contract would be signed by N.C.A.A.? "A. No.

"Q. And your testimony is you do not know whether they have ever executed it or not? "A. I do not know whether they have signed the paper or not, no.

[377] "Q. Let me hand you what has been marked for identification as Plaintiffs' Exhibit Six and ask if you can tell us

what is, please? "A. This is the agreement between A.B.C. Sports and N.C.A.A. covering the 1978 to 1981 N.C.A.A. football seasons.

"Q. Is that a contract also to which you are a signatory? "A. Yes, it is.

"Q. And although the copy we have there as Plaintiffs' Exhibit Six does not reflect a signature on behalf of N.C.A.A., I assume the contract was executed at sometime and performed? "A. I believe it was executed by the N.C.A.A. and it was performed, yes.

"Q. In both of these cases, both of the documents here, were you involved in the negotiation for those contracts? "A. Yes.

"Q. Each of the contracts contains a provision for a minimum aggregate compensation to be paid to the participating N.C.A.A. member institutions in different amounts.

I take it from the contracts—and I hand them to you, if you need to look at them—that in both [378] cases that is the amount of money guaranteed by A.B.C. to the institutions and the N.C.A.A. for the exclusive right to televise college football games as stated in the contract, is that correct? "A. I believe that is correct, yes.

"Q. I find nothing in the contracts which defines how much money is to be paid to each institution participating in a contest which was televised, and so I ask you how, for example, under the contract which has just expired reffered to here as Plaintiffs' Exhibit six, were the rights determined, or the rights fees determined for a national televised college football game of division one teams?

"MR. HARRY: I have no objection to the question, Andy, but to your comment to the effect that the contract does not provide how the price is to be determined. And with that reservation of form for the record, please go ahead and answer it, Mr. Spence.

"MR. COATS: Yes. "A. Our arrangement with the N.C.A.A. calls for us to deal with the member institutions, with the particular host institutions of the games we televise, so taking a national telecast, we would deal with the host institution and contract with that institution, and in terms of the right prices that would be paid to that institution for that game, it would be worked out between A.B.C. and the [379] host institution.

"Q. How is it determined what the amount will be? "A. Well, you take — take the last season, for example.

"Q. 1981? "A. Yes. The figure for a national telecast, as I recall, was six hundred thousand dollars. I determined that figure.

"Q. How did you determine it? "A. I looked at what our commitment was for the '80-'81 seasons, and the commitment for '80 and '81 escalated over '78 and '79, and I just thought based on what we were paying for nationals in '78 and '79, that in combination from the increase for '80, '81, that six hundred thousand dollars would be a fair, proper figure for a national telecast in '80 and '81, and that's how I arrived at it.

"Q. Did you come to a similar determination about the regional telecast fee? "A. Yes.

"Q. What figure did you come up with there, do you recall? "A. It was four hundred twenty-three thousand dollars approximately, I think, in '80 and '81. One addition to my last answer.

[380] "Q. Sure. "A. In terms of the establishment of the regional fee for '80 and '81, after I'd come up with the six hundred thousand dollars for the national fee for each of those years, we knew how many nationals we had to televise each year, and multiplying that number by six hundred thousand dollars, we knew what monies were left from the minimum

aggregate for regionals, so that is really how we evolved the four hundred twenty-three for each regional.

* * *

[384] "Q. Were the national rights fee and the regional rights fee set in that way over other years? "A. You say 'in that way'?

"Q. Yes, in the way that you just testified that you did in 1980 and '81.

"MR. HARRY: By him, Andy?

"MR. COATS: Yes.

"Q. At this point in time, is that the way it has been done? "A. No.

"Q. Tell us how it was done say in '78 and '79, if you know. "A. My recollection—again, I am a bit hazy on this—is that the N.C.A.A. suggested potential rights fees to A.B.C. Sports.

"Q. Do you know how that was done—in what manner it was suggested to you? [385] "A. In—it varied.

"Q. Tell me then of some of the ways in which it was suggested. "A. Well, I am—in certain time frames, it was done in writing, certain times, verbally.

"Q. Would it be fair to say, then, that 1980 and '81 is the first time it was decided unilaterally by you or by A.B.C.? "A. No. I can't testify. We have been involved with college football since '66, and then we were involved earlier than that. And, a, I can't testify to the years I really wasn't involved directly in this, and, b, I don't recall exactly what happened in the early seventies.

"Q. Do you now recall any other years in which it was set as you said it here, by simply making the decision and announcing it to N.C.A.A.? "A. I don't recall any other years, no.

"Q. You do recall that in '78 and '79 that the number was suggested to you by someone from N.C.A.A.?

"MR. HARRY: I am going to object to that, Andy, as a mischaracterization of what he said.

"MR. COATS: This is what I am asking, if that is what he said now. "A. Can you ask the question again, please?

"Q. Yes, sure.

[386] I understood your testimony to be that for the setting of rights fees for the '79 season or for the '78 season, that it was not done, as you have done it here, where you decided, but rather, the figures were suggested to you by somebody at N.C.A.A. Is that true? Is that what you testified to, first of all? "A. Well, I said back a number of minutes ago, our arrangements are with the institutions, in particular the host institution. But it is factual that, to the best of my recollection, in '78, '79, the N.C.A.A. suggested potential rights fees.

"Q. And they had done so in other years? "A. Yes.

"Q. Was a rights fee determined by somebody, whether by A.B.C. or by N.C.A.A., in every year that you have been involved in the process? "A. A.B.C. Sports determines the rights fees.

"Q. Then the suggestions from N.C.A.A. were simply that, and the decision then—you took that into consideration, but A.B.C. Sports made the decision; is that right; is that what you are telling me? "A. I am saying it was our decision as to what we offered the member institutions, yes.

* * *

[392] "Q. So for our purposes, then, you were involved in '77, '78, '79, '80, and '81? "A. Yes.

"Q. During any of those years, laying aside semi-national situations, has there been any deviation from, for any reason, the national rights fee or the regional rights fee established for

division one competing teams? "A. I don't recall any, no. There may have been some. I don't recall any.

"Q. That's sort of what I need to find out. Can you now think of any circumstances under which that would occur, where one of those deviations might have occurred that you think might have happened? "A. I don't believe any deviations occurred in the '77 to '81 period, no.

* * *

[420] "Q. Under the new two-network system under which we will be operating for the next four years approximately, how will the rights fees be set under that system? "A. We are going to establish the fees with the host institutions. Whether or not the N.C.A.A. plans to make suggestions or recommendations to us on that, I do not know.

"Q. Will you do so as you have in the past, that is, by making that sum a function of the total amounts to be paid during any one year? "A. Yes. Take a minimum aggregate sum and subdivide it.

"Q. Will that be the same for C.B.S. as it is [421] for A.B.C.? "A. I can't speak for C.B.S. I assume so.

"Q. But they have to pay a like amount as a total figure for the season, do they not? "A. I sure hope so.

"Q. There was some discussion of obtaining what we might call a 'favored nations' clause, I think, during negotiations; is that so? "A. Yes.

"Q. And the purpose of that clause would have been to do just this thing, so that A.B.C. didn't have to pay much more for a national game than C.B.S. would, or a regional game?

"MR. KESTENBAUM: I don't understand the question, because the contract, as I understand it, doesn't provide for a fee for regional or national.

"MR. COATS: I understand it doesn't. "A. The favored nations point that we were making related to the aggregate sum, not to the individual sums to the institutions.

"Q. We understand that we each have a different position on how that works. But the point is that from your viewpoint, the favored nations clause was applicable to the total season, and it was your position that A.B.C. not pay more for a total season than C.B.S. [422] does, is that what the favored nations dispute was? "A. It was our position that we should not pay more than C.B.S. for the same package of games that the N.C.A.A. was selling us that they were selling to C.B.S.

"Q. What came of that discussion? "A. There was a resolution of that discussion.

"Q. How was it resolved? "A. Let me think: we ultimately agreed to increase our agreed upon rights figure by 'X' amount of dollars up to a maximum level, and if the N.C.A.A. in its negotiations with C.B.S. was able to realize revenues beyond what A.B.C. had agreed to with the N.C.A.A., that our level of compensation, our aggregate compensation would be increased accordingly, but up to a maximum level. And we had a ceiling put on.

There was also a down side part of that, too.

"Q. And the purpose of that is to establish some parity between the networks, so that you are paying roughly the same kind of sum for the same services?

"A.B.C.'s purpose?

"Q. Yes. "A. Yes.

"Q. Under the two-network system, will there [423] be any occasions where C.B.S. and A.B.C. will be competing for a particular game? "A. Yes.

"Q. Describe how that would occur. "A. In the first stage of game selection, as I mentioned before, the so-called 'move' stage, it is quite possible that both A.B.C. and C.B.S. would want the same two teams, the same game to move from its established date to a date on which a game doesn't exist.

"Q. Let's explore that a little bit. Let us assume that the schools have agreed to move at the request of A.B.C. The schools wouldn't know and A.B.C. wouldn't know whether they would ultimately wind up being on A.B.C. or not, would they? "A. They wouldn't know until it was established whether there was a similar request from C.B.S. If there was no conflict, then the game would be in place on A.B.C.

"Q. Is it possible that both you and C.B.S. would ask a school to move but to move to different dates? "A. Yes. In a general sense, there are a number of games that both networks would want to televise.

I thought your question was more specific than that. That is why I talked about the move, the [424] potential conflict in that area.

"Q. Let us take it on through. Let's assume that some of the schools decide to move and some do not, and you get into the next stage. Would there be any situation in the next stage where you would be competing with C.B.S. for a particular game? "A. Competing with or both interested in?

"Q. Where you would be actually competing for it, where you would, both have a chance to, say, bid for the game; anything of that kind? "A. No.

"Q. Is there any circumstance under the proposed or, I guess, new, ongoing two-network television procedure whereby A.B.C. and C.B.S. would be bidding for games, in terms of bidding for rights fees for games? "A. It is certainly possible under the terms of our agreement and C.B.S.'s agreement. First of all, a school doesn't have to go on television.

"Q. Of course. "A. Secondly, it is certainly possible that a particular institution would not choose to make a deal with us or C.B.S.

"Q. Well, that is what I want to get to.

"Let's take a game. For example, let's take [425] the Alabama-Auburn game and it turned out that it was a game that both you and C.B.S. wanted. Would there be any time where you would both go to Alabama, if it was the home institution, and you would say, 'We will pay you 'X' dollars,' and C.B.S. will say, 'We will pay you 'Y' dollars,' and they would take whichever one offered the most; is that possible under this situation?" A. Let me answer your question this way:

"The system is not set up in that way. You ask me if it is possible. I think the answer is yes.

"Q. Let me ask: is it possible under the terms of the agreements, your agreement with N.C.A.A., and C.B.S.'s agreement with N.C.A.A., to do that? "A. I don't know if I would qualify the answer to that. Maybe that is a question to be directed to the N.C.A.A.

"Q. Oh, it will be.

"Take the instance that I just mentioned, if you will, and explain to me how, under the terms of the agreement, it could occur that both networks would be there bidding for the game with, as a corollary, of course, the right of the host institution to choose the network that offered the most money. "A. Well, I am not sure — this is why I think [426] the question should be directed to the N.C.A.A., in terms of what the obligations of the member institutions are to the N.C.A.A. and the N.C.A.A. package.

"Q. You say it was possible. I ask you now, is it possible under the terms of the agreement?

"Are you going to do that under the terms of your agreement? "A. I don't think it is possible under the terms of the agreement.

* * *

[447] "Q. Mr. Spence, you have always dealt with the college football under the overall terms of a N.C.A.A. contract, have you not? "A. That's correct, yes.

"Q. Except, of course, for bowls or games that aren't in the regular season? "A. That is correct.

"Q. In your view, based on your experience, is it preferable for A.B.C. to deal with N.C.A.A. as an organization that more or less sets up this mechanism that you have been testifying about in the form of a package, or is it better for A.B.C. to deal individually with each college without interference by any association? "A. That's really a difficult question to answer [448] without knowing what elements would be involved if there were no N.C.A.A. contract. It would be really difficult to answer. One network, two networks, three networks; how many games, et cetera, et cetera. And I will say, without some control over college football television, that in my opinion college football on network television would not be a very viable entity.

"Q. Could you explain that a little more? "A. Well, I am relating in part to the discussions earlier concerning head-to-head television.

"If you had A.B.C. on against C.B.S. and let's say A.B.C.—if there were no controls, there could be three networks doing college football at the same time, there could be cable telecasts, et cetera, and the ratings would certainly suffer.

"And, in my opinion, the marketplace would have difficulty supporting properly network college football.

"Q. In another factor, in your judgment, the fact that the N.C.A.A. has an entire set of rules dealing with eligibility and rules of play and fairness of competition that make it a viable and desirable product on television? "A. In part, yes."

(Page 105, line 5, through page 113, line 15.)

[449] "Q. Now, A.B.C., I take it, has for the last sixteen years had the exclusive rights to show the college football of N.C.A.A. members on television, has it not? "A. No.

"Q. What have been the non-exclusive aspects of that? "A. Well, there are the exception telecast provisions referred to earlier, there are delayed telecasts that are outside the realm of our agreement.

"Q. Any others? "A. I think those are the main ones.

"Q. What from A.B.C.'s point of view is the desirability of the exclusivity feature? "A. The exclusivity is really the essence of our agreement, and has been with the N.C.A.A., and will continue to be. Exclusivity in terms of a new contract, games we have purchased in the old contract, exclusivity over the entire season. It is important because it allows us to have a product which is special and unique to A.B.C. Sports and now to A.B.C. and C.B.S. Sports as opposed to one that is available throughout the marketplace. And that tracks back to the bottom line, it tracks back to image, et cetera.

"Q. In your experience, does that produce a better product, because you can put more into it by way of [450] promotion development and expect that you will get that back? "A. To a degree, yes, yes.

"Q. You have been asked a lot about minimum aggregate price as it appears in these contracts between A.B.C. and N.C.A.A. What is the reason for that? "A. What is the reason why minimum aggregate is there?

"Q. Yes. Is is desirous from your point of view? "A. The sums referenced in our agreements over the years relate to the sum of monies that we have reached agreement on with the N.C.A.A., they have been set forth as minimum sums, meaning that certainly we could pay monies beyond the minimum if we so opted.

"Q. I take it over the years, these sixteen years, there has always been a limited term of years for which a particular contract between A.B.C. and N.C.A.A. would run, like one year, then two years, then four years? "A. It's been two-year increments, save the contract that ran from '78 to '81 and the current deal.

"Q. Is there any reason for that kind of time limit, rather than a perpetual contract? "A. I think you'd be better equipped to answer that question than me. If you want my answer, it is. I believe the N.C.A.A. has felt that, you know, the more [451] frequently they negotiate, the more advantageous the terms would be to the N.C.A.A.

"Q. Mr. Spence, have these features of the N.C.A.A. contracts with A.B.C., that is the exclusivity, minimum aggregate price and numbers of years, been features that have been incorporated and used in other sports contracts by A.B.C.? "A. What did you say, limited term of years?

"Q. Minimum aggregate and exclusivity. Let's take it under other sports contracts. Do they have those features? "A. No, not all of them.

"Q. Some of them? "A. Yes.

"Q. Are you saying that not all the other programs have all these features or all these other programs have some of these features? "A. All the other programs have some of these features.

"Q. Does that depend on the particular business relationship and bargaining between you and the supplier of the product? "A. Yes.

• • •

[462] "Q. Mr. Spence, during the last decade, during your intensive experience in this business field, has the exposure of sports on television generally greatly increased? "A. Yes.

"Q. Could you describe that somewhat for the court? What was it like when you started and what is it like now? "A. Well, there's been a tremendous proliferation of activity. The number of hours on the three major networks has increased dramatically over the years, the type of programming presented by the networks has increased in leaps and bounds, quantum leaps.

• • •

[464] "Q. Is the two-network concept that Mr. Coats was questioning you about sufficiently shaken down in detail so that you can confidently now say how it will operate once it starts next fall? "A. Not one hundred percent, no.

"Q. In other words, there are some questions that may arise as you actually get, like in any contract, into working it out? "A. I think there will be some, you know, bugs that will have to be shaken out of the rug, so to speak.

"Q. It is really totally new in sports television, isn't it? "A. Yes, it is, this particular two-network arrangement is.

"Q. N.F.L. is totally different, because the league there makes up the assignment of television, doesn't it? "A. The league establishes the schedule of games for the networks, yes.

"Q. The network then is told by the league which games it is going to televise? "A. With very minimal consultation, yes.

"Q. Now, getting back to the question that [465] Mr. Coats objected to. It is your strong belief, is it not, that the exposure of college football on television during the regular season will greatly increase under the two-network arrangement?

"MR. COATS: Note my objection.

"Q. I think you can answer that. "A. The answer is yes.

• • •

[466] "Q. Have you encountered situations where there has been overexposure of sports on television during your experience with A.B.C.? Not just by A.B.C., but any network? [467] "A. Yes.

"Q. And has that caused the product to deteriorate? "A. Yes.

"Q. Could you give us some examples? "A. College football.

"Q. That is a good one.

"Any others? "A. I think we are at a point with boxing on network television, there is overexposure of boxing. It hasn't necessarily started to demonstrate deterioration, but I think we are probably close to that point.

"Tennis. Tennis is a major example of overexposure. And golf, I think, is another example.

"Q. Mr. Spence, when you referred to the overexposure of college football earlier, what did you mean? "A. Well, what I meant there was that in our opinion, the increased exposures in the two-network concept for from '82 to '85, twenty-three exposures to twenty-eight exposures with the two networks, with the appearance limitations not changing all that much, I think there is an overexposure in the new contract; and particularly in the old contracts, when we did twenty-three exposures, it was our opinion that twenty-three exposures was an excessive number of [468] exposures.

"Q. What would be the effect of adding the prime time Saturday night exposure of college football during the regular season on still a third network; would that enhance overexposure? "A. Yes, I think so. I think it would — if that — are you talking about on a network basis?

"Q. Yes. "A. I think that would have — would result in a major marketplace problem for college football, three packages on the market, and also I think it would necessarily hurt the ratings of probably all the packages."

[469] "Q. Has A.B.C. ever done any studies to determine the impact of regular season college football games on television on the live attendance of other games? "A. I don't believe we have, no.

"Q. Having been in the business now for some many years, do you have any judgment as to how it impacts on live attendance? "A. I just — I have an opinion.

"Q. All right. Just tell us your opinion. "A. My opinion is that if there were no controls on college football television, or to put it differently, if you had carte blanche in terms of team selection, that that would end up having a direct negative impact on attendance at a lot of games in this country.

"Q. Now, you said during your testimony from Mr. Harry that college football has some things that make it unique.

"To obtain the right to televise that rare unique package, you have to deal with the N.C.A.A. do you not? "A. Yes.

"MR. COATS: I believe that is all."

[4] **(EXHIBIT 131-A)**

DEPOSITION OF KEVIN O'MALLEY,
DEPOSED FEBRUARY 18, 1982.

KEVIN O'MALLEY,

called as a witness, having been first duly sworn by the Notary Public (Alice Pizzo), was examined and testified as follows:

Examination by Mr. Coats:

Q Please state your name, please, sir. A Kevin O'Malley.

Q Where do you live, Mr. O'Malley? A 400 East 56th Street, New York City.

Q Mr. O'Malley, what is your business or profession? A Executive producer of college sports for CBS Sports.

* * *

Q How long have you served in that capacity? A With that specific title, only in the area of about seven months.

Q What did you do prior to that time? A I was vice president of program planning for CBS Sports.

Q How long did you serve as vice president of planning? [5] A From October 1977 to—approximately four years.

* * *

[8] Q Let me also show you document 192 and ask you what that is. A This is the agreement between the NCAA and CBS. I believe it is the finalized agreement. I am absolutely certain of that.

Q Then this document No. 43 is a sort of analysis or synopsis, is it, of document 192? A I believe that the document 43 is a characterization of the contents of the agreement over the four years in simplified form for internal purposes.

Q Do you know when this document No. 192 was signed? A I don't know specifically, no.

Q You were not involved in the actual finalizing of the document, the signing of it? A I was not involved in signing it, no.

[9] Q What was your role in the finalization of the document? A I was present when the final negotiations when the specifics of the agreement were negotiated and in some regards participated in that negotiation.

Q How were the total rights fees referred to in paragraph 2 of the 192 document and on the front page of the 43 document, how were they determined? A My recollection is that at the session held in Denver, Colorado, at which CBS was awarded one-half of the football package for the four years involved, that the total number which we bid at that time, which is the $131,750,000 referred to, was divided up in increasing sums over the course of the four years to reflect a greater revenue potential, et cetera.

Q How was the original number calculated? A You mean the number that we bid?

Q Yes. A The number was calculated on the basis of an internal process whereby potential sales were evaluated, including the costs of production, personnel required, costs attendant to televising football, an analysis of what the marketplace would bear in terms of advertising and also a question of what we thought [10] would be a winning bid in competing with NBC for the rights to one-half of the package.

Q The figures that are shown there, does that constitute the bid? A Our bid was the 131,750 figure.

Q As a part of that bid, was the allocation set forth on a yearly basis. A No, it was not.

Q It was a total number bid for the four years? A With the understanding that — we asked at the time of the bid that the figures escalate over the course of the four years and not be constant.

Q Who determined or how was it determined how that total bid would be allocated on a yearly basis? A How the figures were specifically arrived at in terms of exact dollars, I don't recall. It was basically agreed by the Negotiating Committee of the NCAA Television Committee that this escalation and rights on an annual basis was permissible and then I believe that our business affairs people met with the — representing the Television Committee settled upon those numbers.

Q There was some intercourse between your people and the NCAA people? A Yes.

[11] Q Do you know that the ABC package is the exact same figures? A Yes, I have been told that.

Q Do you know how that came about? A My understanding was at the time that we were making our bid against NBC for the other half of the package, the ABC half of the package had basically been negotiated and that when we asked at the time we were to present our bid, we asked representatives of the NCAA Negotiating Committee what were the circumstances under which we were making the bid relative to the figure they had settled upon with ABC, their reply to us, as I recall, was that ABC had agreed with them that should the second half of the negotiation result in a higher figure, that ABC would step up to meet that figure; should it result in a lower figure, that the ABC requirement in terms of dollars would be reduced to the figure negotiated in the other half of the negotiation.

Q Do you know in this case what was done? Was ABC's raised, lowered, to meet yours, or do you know? A I don't know for certain.

Q This contemplates the payment, let's say, in the first year of $29,500,000. How is that to be paid? [12] A It is paid in individual game fees to the institutions involved in the games.

Q Can you tell me how it would be determined how much is to be paid for, say, a national division game next year?

MR. VRADENBURG: Are you asking how it will be determined or has it been determined?

MR. COATS: How it will be under the '82 proposal. I assume they haven't done it.

MR. HARRY: I object to the lack of foundation. It calls for future speculation.

Q Now you may answer. A When the renegotiation is complete, again, a special convention in December called for renegotiation involving the number of games involved for Division I-AA NCAA institutions. When that renegotiation is complete and it is clear to us the total number of national and regional games in all divisions of the NCAA which must be carried under the plan, we will then set figures for rights fees for national games, figures for rights fees for regional games, figures for rights fees for games of Division I-AA institutions participating in the plan, and also a separate amount of money set aside for incentive payments which are to be made to schools which comply [13] with requests by the network to move their games to unusual dates.

Q I take it that the total of those that you have just spoken to would be not less than $29,500,000 for the 1982 season? A Yes.

* * *

[42] *Examination by Mr. Harry:*

MR. HARRY: I would like to get that marked [43] as an exhibit. Mark that document as Defendant's Exhibit A for identification.

(Document headed "Notes of Meeting with Kevin O'Malley and Beano Cook, CBS" marked Defendant's Exhibit A for identification, as of this date.)

Q Mr. O'Malley, you might look at that memorandum. It doesn't have a date on it, but it refers to notes of a meeting with Kevin O'Malley and Beano Cook of CBS and we believe the obvious, being Mr. Neinas, refers in the second line of the text to a meeting which took place on December 10th, which we believe to be December 10, 1980. However, I will ask you if you recollect the meeting and can place the date. A I can't place the date specifically. I do recall that Mr. Cook and I had lunch with Mr. Neinas around the time.

Q When you say "around the time," would that be around 1980? A It was that winter, late in 1980.

Q Mr. Neinas in the memo makes certain listing here of pertinent observations from the meeting and I would like to ask you about some of those. Take the first one, for example. It states, "College football [44] should sign a multi-network package."

Was that a statement or an opinion given by you or Mr. Cook? A Yes. I told Mr. Neinas that he was familiar with the fact that I proposed a multi-network package previously to the NCAA and I reiterated to him that I thought that it was in the best interests of the college football for the NCAA to have a multi-network package, whether CBS was one of the networks or not.

Q When had CBS proposed to NCAA previously to this that it go to a multi-network package? A 1977.

Q During the bidding time for that contract? A Yes.

* * *

[56] Q Would you look at paragraph 19, sir, which deals with major differences in ratings between college and professional football occurring earlier in the season.

Was that in fact true in 1980? A I believe if I could characterize what I think—

Q You can either give your opinion at the time, your own business judgment; if that's all you have, that's fine. A My judgment was, and I believe this is part of the conversation with Mr. Neinas, that one of the problems that college football on television had was that it was on a network which also had major league [57] baseball, and that the promotion which was given by the network, ABC, to major league baseball was subtracted from the prospective promotion they might have given to college football.

In that sense, the existence of baseball did hurt college football ratings on ABC.

There is a reference here to NBC baseball telecasts which I don't recall.

* * *

[58] Q Let me show you Exhibit 930, please, which I think is exactly on the topic you are discussing. It is dated April 16, 1980 and is a memorandum from you [59] to others and has attached to it an agenda for the College Football Association meeting that May and June, and ask if that is a memorandum that you wrote to the people indicated about your meeting with Mr. Neinas. A Yes.

Q Does that reflect what Mr. Neinas told you in terms of the four conclusions that are stated there in the middle of the letter, the first page? A Yes.

Q Did you advise Mr. Neinas at the April meeting that college football is a losing proposition financially? A As I say, I know I indicated that to him several times. I don't remember if at that meeting I did.

Q At that time in early 1980 was the college football programming popular with the affiliates? I take it that's the affiliate stations. A Yes.

Q Did you then believe that college football had not yet reached its potential? A Yes.

If I might clarify the answer I just gave you with regard to the affiliated stations?

Q Fine. [60] A I earlier testified that one of the problems we thought we had internally at CBS with the prospect of acquiring college football was the amount of time it would require, taken on Saturday afternoon, and that I did not think would be popular with affiliates.

We did know, however, that the acquisition of college football in general would be popular with our affiliates, particularly in the smaller markets.

Q Did you feel that college football had suffered because of ABC's long period of exclusivity? A Yes.

Q Did you have an understanding in 1980 that 70 percent of the sets in use watch pro football on Sunday? A To be exact about it, I believe that I indicated that when NBC and CBS were carrying competitive telecasts on Sunday afternoon at any given time as many as 70 percent of the sets on were tuned to professional football, yes.

Q You felt ratings would increase for college football if they went to two networks instead of one? A Yes.

Q To be specific, Mr. O'Malley, was it your view in 1980 that combined ratings for professional Sunday telecasts would be in the neighborhood of 30 when the [61] colleges were then receiving 11 rating points on Sunday afternoon? A Yes.

Q Excuse me, on Saturday afternoon. I misspoke. A Yes.

Q Did you know in 1980 that college football was receiving $31-million for an 11 rating and 23 exposures in 1980? A Yes.

Q And professional football would receive $140-million from three networks and 68 exposures for 1980? A Yes.

* * *

[77] *Examination by Mr. Vradenburg:*

Q Earlier in Mr. Coats' questions, Mr. O'Malley, he asked you a series of questions concerning CBS's planning or lack of planning in determining the per-game compensation for football games starting this fall. You referred to the fact that CBS had not yet commenced its planning in that regard in how to settle those prices. A That's true.

Q What did you mean by the word "settle" in that instance? A To establish our own guideline as to what [78] were appropriate rights fees to be offered to an institution for a national appearance, or for a regional appearance.

Q Do you contemplate that the actual game fee that will be set is going to be the product of discussion, negotiation, with individual institutions? A Absolutely. The fact that we have a fee in mind when we call them is not similar to other situations when we deal with sports, doesn't mean they are obligated to accept that fee. They undoubtedly want to negotiate that fee with us.

MR. COATS: Let the record reflect my objection to those two previous questions as being leading and suggestive.

Q Mr. Coats asked you a series of questions regarding whether CBS anticipated that the sum of game compensation

fees would equal, exceed or be lesser than the minimum aggregate compensation of the contract.

Do you recall that general line of questioning? A Yes.

Q Is it possible to determine now whether or not the sum of all of the game compensation fees is going to be lesser, equal to or greater than the minimum aggregate compensation set in that contract?

MR. COATS: Please note my same objection [79] to the form of the question.

A I think it is fair to say that it is our hope that the aggregate compensation won't exceed that number, but there is certainly no guarantee.

[478] **WILLIAM S. BANOWSKY**

was called as a witness by the plaintiffs, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Coats:

Q. Please state your name, sir. A. William S. Banowsky.

Q. Where do you reside? A. At 1200 South Pickard, Norman, Oklahoma.

Q. And what is your business or profession? A. I am president of the University of Oklahoma.

Q. Tell the Court, if you will, briefly, or give the Court a sketch of your educational and professional background. A. I was reared in Texas. My undergraduate work is from Tennessee. I have a master's degree from the University of New Mexico at Albuquerque, and a doctor's degree from the University of Southern California, Los Angeles.

My graduate work has been in the field of commu-

nications. I was, for ten years, president of Pepperdine University in [479] Los Angeles. For five years, early in my work, I served in the ministry, and now for four years I have been president of the University of Oklahoma.

Q. All right, sir.

Doctor Banowsky, I would also like for you, if you would, please, to sort of sketch maybe in slightly historical perspective how it happens that the University of Oklahoma finds itself involved in this litigation? A. I suppose it's been a natural outgrowth of concerns which have been sharpening at the university through the years. That is to say, I don't think there's any particular strategy or plan that we would be engaged in quite this serious a legal action, but we have had an escalating concern across a period of at least a half-dozen years, certainly before I came to the university, about what we felt were the unfair and somewhat coercive controls of the N.C.A.A.

I don't think anybody in Oklahoma fails to appreciate the value of the N.C.A.A. We regard it as a positive thing, generally; certainly as one of the major contributors to intercollegiates and American higher education. And we strongly favor our continuing role in the N.C.A.A., and the policing and regulating of the contests for rules and regulations that govern the recruiting and other codes of conduct.

What we have grown restive about is the controls and intervention and regulation of the N.C.A.A. into the commercial [480] and business activities of the University of Oklahoma.

We are not Harvard or Stanford, we live in a part of the country where our athletic program is one of our great traditions. We think excellence is contagious, and a recognition of quality in our sports events of all our teams is one of the assets we have in trying to compete, frankly, academically, against the institutions in the Ivy League or on the west coast.

And, therefore, to be in a controlled or regulated situation in which we feel our product, our ability to maximize the

advantages and opportunities of the institution, are being adversely affected, is the thing which we have regretted.

This is why the University of Oklahoma joined the College Football Association, not to leave the N.C.A.A., not really to be at war with the N.C.A.A., but to try to plead with the N.C.A.A. on matters of simple justice.

And, frankly, much progress toward greater justice has been achieved, which would not have been accomplished if those sixty-one institutions, including most of the major conferences in the country, had not had the nerve to challenge the almost dictatorial power of the N.C.A.A.

The C.F.A. organization has led to a restructuring within the N.C.A.A., which we would not have had, had we remained silent. This fall, for instance, the N.C.A.A. now will permit not one television broadcast on Saturday, but three. [481] There will be two networks, and then there will be a cable arrangement. And I don't think we would have had those advantages and others, if we hadn't—if we hadn't spoken out.

We felt that at issue were some legal questions, which perhaps ought to be aired in this kind of a court proceeding, as to whether or not the property of the University of Oklahoma, including its football programs and telecasting of those programs, belong to the people of the State of Oklahoma. I mean, the school is a public institution, and the taxpayers pay the bill—or whether or not we were simply signing that property over to an organization when we affiliated with that organization.

We maintain that's a precious property right. We think it's worth several million dollars a year to the University of Oklahoma, at a time of inflation and difficult budgets, when it's very difficult to field these athletic programs; that here is a product which the University of Oklahoma enjoys, which is being severely infringed upon and limited by unfair restraint of trade.

I suppose, Mr. Coats, it was because of that general concern which had developed through the years, that we felt that the only alternative would be for this to be given its day in court.

• • •

[486] Q. Doctor Banowsky, you observed both, I suppose, in Los Angeles and in Oklahoma, the interaction of universities, and I would ask you to comment to the Court on any competition or areas of competition which you have observed between universities. A. Well, universities don't compete in anything except faculty, students, money, and in those areas. I think competition is good. University of Oklahoma is competing in this state against Oklahoma State University, against other institutions.

The competition for faculty, for students, we are constantly recruiting in the state against one another, to generate better and better student pools. And I think competition among institutions, just like competition among individuals, it brings out the best in us, it hones our qualities.

• • •

[488] *Cross Examination by Mr. Harry:*

Q. Good morning, Doctor Banowsky. A. Good morning, sir.

Q. Doctor, I think you stated that in your view, the television rights to the Oklahoma football program were worth several million dollars a year, is that correct? A. Well, let me say that that is—that is certainly not a sophisticated technical or financial analysis. It's [489] only my best judgment as a chief executive officer, that if our institution were, in fact, free to take our schedule of ten to twelve games, and then to negotiate with

all of the networks, with all of the cable people, with the satellite people, or whatever else, over the period of the seasons, that it does, in fact, cost us several million dollars.

Q. So that's just your own opinion based on your general knowledge? A. That's my own opinion, based upon my general assumption, rather than—I think "knowledge" might be too refined a way to put it.

* * *

[490] Q. Doctor, what is the annual cost for the latest period available of the Oklahoma football program, expense factor? A. Our total athletic budget is about ten million dollars a year, and I would have to refresh myself by looking at the budget to know how much of that is a football expense. Now, a sizable amount of it is, and virtually all the revenue side is football.

Q. Would someone else here, like Mr. Walker, perhaps, know more about that? A. Yes.

Q. So, I think you also said on your direct examination, Doctor Banowsky, that your concern is not only for Oklahoma, but to benefit all institutions in their athletic programs, as well. A. That's right. I mean—and I wish to make that point as clear as I can. I didn't attend a big state university, I attended a small, Christian institution in Tennessee, and a public institution in New Mexico, and then [491] a private university in California, for my own education. I have been the president of another private institution.

I think one of the reasons we are in the education business is because we would like to somehow give our lives to something that is a little less partisan, a little less sectarian, in something which sort of helps the whole cause. So I think it would be unfortunate for any of us to be arguing for a special private privilege, which, in fact, was detrimental to the total good.

I think, Mr. Counselor, that if we were free in the country, that what we would see is not simply Oklahoma and a few other schools being on all the time. In terms of a big, national picture, we would see a lot more regionalism. I think a lot of the schools in smaller states with less population, if they were free to do so, would be on television a great deal more than those regions and their people in Oklahoma, for instance, who can't get into your stadium because it's limited in Ardmore and Ada and Idabel and Muskogee, whom I believe would enjoy the University of Oklahoma football program a great deal more.

* * *

[494] Q. Now, Doctor, you are aware, are you not, of the fact that—and I think there's an exhibit in here, so I won't go in details, it's exhibit N-one—the Big Eight Conference rules provided for sharing of revenues among the members from college football television? A. Yes, sir.

Q. And that's on the basis that the team that plays gets an extra share, but other than that, it's divided equally among all members, isn't it? A. Yes, sir.

Q. Now, have you made a complaint about that rule? A. I would say that there is frequent discussion of that rule within the conference, and that the conference is a voluntary and free association. We have even had, sometimes, [495] informal discussions at the University of Oklahoma, whether we would be better off to be an independent institution such as Notre Dame or Penn State or others.

We have concluded decisively up to this point that the benefits of being in the academic community of sister institutions called the "Big Eight Conference" greatly outweighs whatever disadvantages we feel are attendant to our larger share, paying the larger share of the way.

But even this summer, there have been informal discussions within the conference of whether or not those arrangements should be altered, and they are altered from time to time.

Q. Has Oklahoma made any recent effort to change the revenue-sharing rules of the Big Eight? A. No, sir, but the University of Oklahoma and the University of Nebraska have been in informal conversation within recent weeks about what we should do when those things come up for official discussion again.

Q. Now, Doctor Banowsky, let me ask you: has there been a corresponding consideration by Oklahoma, similar to that about leaving the Big Eight, to leaving the N.C.A.A.? A. No, sir. And I would like to stress the word "informal." We have been a member of the Big Eight Conference for a long time, and we greatly appreciate that affiliation. All I am saying is that we feel that we are there on a voluntary basis, and if we choose this fall to leave the Big [496] Eight Conference, we would regret not having that kind of close fraternal association with the other seven schools.

But the University of Oklahoma and its athletic program could move forward in an unimpeding way; if we thought we would leave the N.C.A.A., we would be totally wiped out. It's not a voluntary association. We can't play football if we leave the N.C.A.A. We think the powers and controls of the N.C.A.A. are so pervasive and coercive that we would be unable to schedule in a meaningful way, we would be unable to conduct championships in any meaningful way.

So I think if we wished to, to construct an analogy between the N.C.A.A. and the Big Eight Conference, that the analogy does not work in favor of the N.C.A.A.

Q. Doctor, have you given any consideration at any time to Oklahoma withdrawing from N.C.A.A., not by itself, but in conjunction with a number of other members? A. I can tell you that we have never seriously considered withdrawing from N.C.A.A., and that that is not our desire now.

We regard the N.C.A.A. as one of the positive influences in the history of American higher education.

Q. So you do not know from having given it consideration, whether it is feasible for a group to withdraw from N.C.A.A. and have its own viable regulation program for sports? A. I do not know. I would judge that if a group of [497] enough institutions were to withdraw, that that group then could become some kind of a separate organization. But a single university which sought to withdraw, I think would be defeated.

* * *

[501] Q. Doctor, do you have any personal knowledge of any threats or coercion made by anyone connected with the N.C.A.A. against Oklahoma University? A. I would like to say two things here.

Q. Go right ahead, sir. A. In the first place, nobody has ever made any personal threat to me, nor in some formal or concise or clearcut way provided any form of intimidation.

However, as the president of a major university, there is very little that I fear more than our relationship with the N.C.A.A., for this reason: it's what a taxpayer fears in his relationship with the I.R.S. It's not that the taxpayer may be trying to do something dishonest, it is he fears a power which is pervasive and has such control over his life.

If I were to shoot the deal of the University of Oklahoma [502] on the campus this morning, it probably would not make *The New York Times*, but I wake up every morning knowing that anything in our athletic program might, because of the terrific powers of the N.C.A.A., be on the pages of *The Los Angeles Times* immediately.

Therefore, when we are going into this kind of battle, Mr. Counselor, I have been concerned that we might, at some point, face expulsion. There has been specific discussion among all of the presidents of the Big Eight as to whether we were wise or unwise to lead our institutions in a direction which might, in fact, end up in expulsion. Nothing could be more serious a threat, of course, than expulsion.

So it would be inaccurate to say that somebody had warned me we might be expelled, but in the performance of my duties, it did occur to me that we might be leading in that direction.

Also, I would be less than candid if I did not say that I have been concerned that subsequently, next year, the year after, the year after, when the smoke settles, the N.C.A.A. might wish to exercise unusually intense investigative procedures of those institutions which have had the nerve to challenge them in this public way. And in those cases we are at the mercy, of course, of that system, a policing system which I wish to say that I strongly favor. In the past decade the University of Oklahoma has benefited from those [503] regulations and has not had any serious—serious infractions brought to its attention.

I have not been personally threatened, but I have been living with the reality that this was very serious business, and having watched the way particularly in which the N.C.A.A. has exercised its ability to manage during these affairs, I have hoped that I would never live to regret the fact that we had tried to express our convictions in this highest possible arena.

* * *

[3] **(EXHIBIT YY-2)**

DEPOSITION OF DR. WILLIAM S. BANOWSKY, DEPOSED DECEMBER 21, 1981.

WILLIAM S. BANOWSKY,

a witness, being produced, sworn and examined on behalf of the defendant, deposeth and saith as follows:

Direct Examination by Mr. Harry:

Q. Would you please state your name, sir? A. William S Banowsky.

Q. And your address? A. 1200 South Pickard, Norman, Oklahoma.

Q. Your occupation? A. President of the University of Oklahoma.

* * *

[13] Q. Okay. Could we go now to the meeting of the chief executive officers, I believe it was the Big 8 that you did attend, sir, and I think that was on September 2 of 1981 and I believe was it was in Kansas City; is that correct? A. I did attend a meeting, I'm not certain of the date.

* * *

[15] Q. Okay. So Doctor Massengale then called a meeting as rotating chairman of the chief executive officers of the Big 8 universities? A. Yes, sir.

Q. And were all the eight chief executive officers present? A. Yes, sir.

[16] Q. And do you recall who else was there? A. I think that all or virtually all of the athletic directors and faculty representatives were there so that in effect it was a meeting of the three representatives of each of the eight schools.

Q. And were persons other than those from the Big 8 present? A. Not that I recall. Of course, Commissioner James and members of his staff were there.

Q. Yes, sir. And Walter Byers was there, was he not? A. Mr. Byers made an appearance in the meeting.

Q. In other words, the meeting began without him and then he appeared at request later on? A. Yes, sir.

* * *

[17] Q. All right. Was there explanation of why Mr. Byers was asked to be there and the reasons for his presentation? A. Yes. I think that he had been invited to express the point of view of the NCAA.

Q. And what did he say when he appeared? I don't mean to the exact words, but your best recollection of the gist. A. Excuse me.

(The witness and Mr. Coats exited the room.)

Q. (BY MR. HARRY) Mr. Banowsky, let the record show that you've had a brief conference with counsel and we will ask the reporter to read back the question.

[18] (The last question was read back by the reporter.)

A. My best recollection of the climate at that time was that we were on the eve of what might be regarded as one of the early deadlines of the NBC contract, maybe it was September 14 or 17. At any rate, that was one of the things which placed some urgency in the meeting in Kansas City. And my recollection is that Mr. Byers was trying to be reassuring along those lines that there was a letter from him or from the NCAA Council which had been circulated that might have alluded, and I'm certainly not sure of this, to potential questions of restructure of the NCAA and for a period of 15 or 20 minutes he spoke to the group in general terms about some of those things.

Q. Can you remember anything that he said? A. No, sir. I do not remember any—any specific deliniation of some issue that I felt was crucial to our concerns. I do recall a very clear sense of disappointment by a number of us that there had not been achieved quite as much of a spirit of compromise or reassurance as we had hoped for and this feeling of disappointment was clearly expressed by virtually all of us in the executive [19] session of chief executive officers which followed.

• • •

[20] Q. Doctor Banowsky, can you now recollect anything specific that Mr. Byers said at the meeting of September 22? A. Nothing with such specificity that I wish to try to quote him at this time.

Q. I understand. What was it that he said that caused you a sense of disappointment? A. A general sense of confrontation. It was more a climate than anything that was specifically said. In fact, it may have been in part the absence of any specific reassurances, and I would say, just to be as clear as possible, that the subsequent events which culminated or which climaxed in the St. Louis Special Convention were entirely consistent with what I might have guessed would have occurred in my first encounter with Mr. Byers. I developed at that point a respect for his ability to operate a disciplined organization and I stood in awe of that discipline when I went to St. Louis.

Q. The first time you met Mr. Byers was I take it the September 2 occasion? A. Yes, sir.

Q. Now at the September 2 meeting did Mr. [21] Byers make any threats? A. No, sir.

Q. What was it that you expected from him that he did not produce at that meeting? A. There had been some speculation on the parts of one or two of the other presidents in our conference that the NCAA might have been coming forward with—I think more reassurances of substantial restructuring, and more reassurances that there would be—not that—it is not that there were specific threats made but reassurances that schools need have no fear of any kinds of threats.

• • •

[22] Q. Were you told that there would be a special meeting of the NCAA to deal with restructuring? A. No, sir.

Q. That was one of the reassurances you would like to have had but didn't get at that meeting right? A. Yes, sir.

Q. Was anything said by Mr. Byers about the NCAA proceeding through its Infractions Committee against anyone because of their activities through the CFA in regard to television of college football? A. Not that I recall.

* * *

[62] Q. Let's go to the No. 9 proposition, Doctor Banowsky at the Special Convention regarding property rights. One of the sponsors of that resolution No. 9 is the University of Oklahoma.

MR. COATS: Is that the right book?

MR. HARRY: I'm sorry, I'll hand it to you. In that I believe is the identical resolution. The property rights is No. 9 at the Special Convention, is identical to property rights No. 36 at the Annual Convention.

MR. COATS: Okay.

Q. (BY MR. HARRY) Did you participate in the preparation of that proposition or resolution? A. Not personally.

Q. But you were familiar with its text and studied it and approved it before it came up or before you attempted to have it brought up at the convention? [63] A. Generally so.

Q. Now, does it apply the the football television rights? A. It seems to.

Q. And it applies, I take it, to other property rights as well? A. It seems to.

Q. Would it permit the universities to determine the number of games they would play during the year? A. Presumably.

Q. And the use of their coaching staff in recruiting?

Would it help you to have this one (indicating)? A. Is it the same one?

Q. It's the same text but different proposition numbers for different conventions.

MR. COATS: All right, now, let's be excused just a minute.

(A brief recess was here taken.)

(The last question was read back by the reporter.)

A. I would like to correct my previous answer to say that I'm not sure that this proposal would [64] have any preference at all to the number of games we play. It certainly is not the attitude of the University of Oklahoma that this proposal addresses that kind of question. It is our thinking in being in favor of this proposal that it addresses specifically and exclusively the issue of the property rights of the University of Oklahoma regarding the telecasting or broadcasting of our athletic events. We favor the kinds of assistance that we receive from the NCAA on numbers of games which should be played and the size of coaching staffs and academic regulations and other rules and procedures that are required to conduct the very finest kind of intercollegiate contest. It is my strong personal conviction that the NCAA does and has done a superlative job in this field and it's awfully difficult to make that deliniation, but I can speak with a total conviction personally, and I think for the institution, when I say that we do not propose this property rights issue to try and be releived from those other legitimate controls and rules in which we believe the NCAA plays a very necessary and proper role.

Q. Thank you. Taking proposition No. 9 at the Special Convention, Doctor, is it your view [65] that it applies only to television of intercollegiate sports? A. No, sir. I think it should apply to other—to any issue that goes to the very essence of the property of the institution, such things as the size of our

stadium, what kind of a ticket price we may charge people who come to our stadium, the use of the logo of the institution; is that our right or is that a right that we deed over to some association which we may join, so it might be somewhat larger than the television issue per se, but it does not, in my view, extend over into that legitimate area where we feel the University of Oklahoma and all institutions need some kind of an association which can be certain that the rules are fairly arrived at and are fairly observed by all.

Q. Is it your view that the property rights resolution No. 9 at the Special Convention would eliminate, however, all NCAA controls on television of college football? A. Yes, sir.

* * *

[85] Q. Doctor Banowsky, are you aware of any [86] activity by CFA to establish an association comparable to NCAA? A. No, sir.

Q. You didn't know that Mr. Neinas had developed sort of an outline for such a program? A. The extent of my knowledge has been a very rudimentary paper that came to my desk that I assumed was mailed to all members of the CFA that suggested what some kind an alternative approach might be, but I have been in no discussion of any such thing and know nothing except for the appearance of that document.

Q. Has CFA authorized Mr. Nienas to develop an alternative organization to NCAA? A. Not to my knowledge. Again, CFA is administered primarily by its Board of Directors and I'm not a member of Board of Directors so I can't speak for the Board, but certainly not to my knowledge. And I would like to stress that it is the University of Oklahoma's desire and position to continue to be a member in good standing of NCAA. We have no wish to form any separate organization and are not seeking to be a party to any effort to form one.

Q. Okay. I take it, then, to your knowledge, [87] the University of Oklahoma has not made a study of the feasibility of such an alternative organization? A. I can speak conclusively that the University of Oklahoma has had no discussion whatsoever of any such option.

* * *

[3] **(EXHIBIT YY-3)**

DEPOSITION OF DANIEL G. GIBBENS, DEPOSED DECEMBER 21, 1981.

DANIEL G. GIBBENS,

a witness, being produced, sworn and examined on behalf of the defendant, deposeth and saith as follows:

Direct Examination by Mr. Harry:

Q. Would you please state your name, sir? A. Daniel G. Gibbens.

Q. And your address? A. Home address is 1306 Greenbriar Drive, Norman, Oklahoma.

Q. And your occupation, sir? A. I'm a law teacher.

Q. At the University of Oklahoma Law School? A. That's correct.

Q. And what do you teach? A. Constitutional Law and Criminal Procedure and some other courses that are related to those.

* * *

[6] Q. Now, what has been your experience or education or teaching, if any, in the antitrust field? A. Really none.

* * *

[11] Q. Well, what involvement did you have in the decision to commence the action? A. I guess the possibility of litigation came up in conversations and discussions sometime in late spring of this year or early summer, but it was only the possibility and at each point at that time frame, it was recognized by me and by the others in the conversation that we did not want to go to court unless we were put into a position where we felt like it was absolutely necessary. And that was my position up until a few days before the filing of this case.

Discussions became more intense following the Atlanta meeting of the CFA at which the NBC contract was approved, and during that period of time following the Atlanta meeting, the individual [12] CFA member schools had the opportunity of opting out of the NBC contract, and as we came closer to the cut-off date for that opportunity to opt out, it became apparent that the number of schools were really having difficulty with the prospect of NCAA sanctions and needed, as we perceived it, the protection of a court restraining order. And it was within a few days prior to the filing of the lawsuit that the CFA made the request of the Universities of Oklahoma and Georgia if they would be willing to be plaintiffs in the lawsuit, and we agreed, and I participated in those discussions.

Q. Now, you, in a sense, were involved to some degree at least with CFA, and of course I take it your basic position was that of a lawyer looking out for the interests of Oklahoma University, were they not at the time? A. I think more accurately, a faculty member with law training looking out for the athletic interests of the University of Oklahoma.

Q. That's what I meant to say. Thank you.

Now, from whom did this CFA request, concerning the institution of the lawsuit come? Who personally or individually did that? A. I think it came to me first and I am not [13] sure — I don't recall whether it was as a part of a conference call of some sort or whether it was in a telephone call with Chuck Neinas.

Q. And do you know how the University of Georgia happened to become a plaintiff? A. There were a number of telephone conversations at the time that the University of Oklahoma decided to become a plaintiff, and I was a party to a number of telephone conversations. I really do not recall what the communications were, between whom, whereby Georgia decided to come into the lawsuit. The University of Oklahoma at least initially did not wish to be alone in the lawsuit, and so there were conversations with other schools.

Q. Right. Professor Gibbens, did you participate in the action of the CFA leading up to the request to Oklahoma to be a plaintiff in this suit, or was that done by other CFA people so that you got word from the CFA to you? A. That was done by other CFA people.

• • •

[83] Q. Okay. Now, the judge kept asking this question so I guess I better ask you. You would know better than anybody. Why was the decision made not to have this lawsuit brought by CFA? A. The CFA, as an entity, did not have the interests at stake that the individual institutions had. And that sums up quite a few important considerations, but that was the specific concern.

• • •

Q. Is it not true that CFA requested Oklahoma to bring the lawsuit? A. CFA did request Oklahoma to bring the lawsuit along with others. There had been, I think, preceding that request, as I understood it, a number of conversations with respect to who would [84] be the most likely and best qualified plaintiffs. And part of the decision with respect to—and as related to me, as I recall, concerning the University of Oklahoma being a party plaintiff was that we were on line over the Labor Day weekend and, as I recall, it was over the Labor Day weekend we were on line to move and make decisions in ways that other universities apparently were not.

Q. But the request did come from CFA? A. That's correct.

Q. And from whom individually? A. I am not clear at this time on whether it was from Chuck Neinas or whether it was from a group of people as parties to a telephone conference call. I think it was probably Chuck Neinas, but I'm not sure at this time.

• • •

Q. Thank you. Did the CFA Board of Directors of which you were a member, I believe, approve the filing of this lawsuit? A. My understanding is that it was at the [85] request of the Board of Directors that the University of Oklahoma was asked to bring the lawsuit.

Q. And what— A. And therefore, to be very direct, it was my understanding that the CFA Board of Directors did approve it. Now this was prior to the time I joined the Board of Directors.

Q. That's right. When did you join the Board? I think you told me, but I forgot. A. We had a Big 8 meeting on or about October 1 and it was at that meeting that I was appointed.

Q. I see. Thank you. I take it then it was a decision of the Board of Directors of the CFA and not any decision which was approved or ratified by the members?

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[89] Q. Let me ask you, did you attend both days of the Special Convention in St. Louis December 3 and 4, 1981? A. I did.

Q. And did you take any active participation or speak at the General Convention meeting? A. I did.

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[90] Q. Now, did you attend the CFA meeting that followed the Special Convention? [91] A. I did.

Q. And what occurred there? A. I think the opening of the—the session opened with a review by Chuck Neinas of the events of recent months. As I recall, next the members were asked if they wanted to discuss anything else. I think that it was Chancellor Young of LSU who spoke first and he addressed some wide-ranging concerns related to intercollegiate athletics. I think next President Banowsky spoke, emphasized the context in which Oklahoma sought to seek implementation of the NBC contract and then made the announcement that the University of Oklahoma would be committed to the NBC contract if it was joined by nine other institutions, including the University of Texas and one other sister institution from the Big 8 Conference. There was some—following that, Joe Paterno spoke generally in support of the NBC contract, in support of a variety of concerns related to intercollegiate athletics. The President of Clemson spoke at some length in a similar vein. There may have been several other short speeches made.

Q. Was it then known that the date for deciding whether to remain with the NBC contract on [92] the part of each member of CFA was to be December 14th? A. It was then known. That was a part of President Banowsky's statement.

Q. So that at that point each university was evaluating its position in the process of making its decision? A. That's correct.

Q. And did you have any participation, then, in dealing with the members as to how they should decide, whether to remain with the NBC contract or not? A. I had telephone conversations with each of my faculty representative colleagues in the Big 8 Conference. I spoke with the other seven individually on the telephone. I spoke with Mike Johnson who is the faculty representative at the University of Houston, and an acquaintance of longstanding. In all of these conversations, my primary goal was to make sure that it was understood what the position of the University of Oklahoma was that obviously we were in favor of the NBC contract. I was concerned to find

out if that position was well understood, and to make myself available for questions regarding our position or [93] the NBC contract.

In none of those conversations did I go into specific arguments or advocacy of specific aspects of the NBC contract. My assumption was that these people knew that at this time and I did not need to make any—that any additional urgings on my part would not seem appropriate to my colleagues.

I did get some few questions from a few of the people that I talked with, but nothing that was really memorable. As I recall, these were the only people that I talked with with respect to that decision and at that time.

We did have one or more CFA Board telephone conference calls during that period, in which we were discussing how things were going, and how to resolve the issue in light of various possibilities on the 14th. I suspect that I had some—I think that much is responsive to your question. I'll add this much. That I didn't have probably one to two telephone calls with Chuck Neinas individually to see what—to exchange ideas.

Q. And then did you learn shortly after December 14 that none of the other Big 8 schools [94] had held fast to the NBC contract? A. No. I understood that the decision was made to see if the contract could be effectively canceled before the final deadline for receiving position responses.

Q. And did that in fact happen? A. That's my understanding.

Q. So that NBC was advised even before the end of the day on the 14th that there would be no contract? A. If they were willing to have it canceled in that fashion, why, it was thought to be desirable as far as the CFA was concerned.

Q. And why was that desirable, Professor Gibbens? A. It appeared that regardless of which schools or how many schools

wished to stay with the contract, that it would not be a sufficient number to make it really a desirable contract.

Q. So it was an appraisal of the situation in anticipation of the result which you felt was better to initiate the decision rather than wait for it, so to speak? A. That's correct.

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[98] Q. To what extent is the CFA supporting this litigation financially? A. My understanding is that the CFA is supporting the entire cost of the litigation. Now, that doesn't mean that the University of Oklahoma doesn't understand that it's primarily responsible along with the University of Georgia.

[99] Q. As parties, but in the first instance, as a director of CFA, it's your understanding that the CFA will pay the entire expenses? A. That's my understanding.

Q. When was that arrangement made? A. It was communicated to me at the time that the University of Oklahoma was asked to be a plaintiff.

Q. Before you went on the Board? A. That's correct. It had been reaffirmed in subsequent Board telephone conference calls in one or more subsequent conference calls.

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[3] **(EXHIBIT 131-B)**

DEPOSITION OF THOMAS C. HANSEN, DEPOSED NOVEMBER 10, 1981.

THOMAS C. HANSEN,

a Witness, of lawful age, being produced, sworn and examined on behalf of the Plaintiffs, deposeth and saith:

Direct Examination by Mr. Muchmore:

Q. Would you state your name, please? A. Thomas C. Hansen.

Q. Where do you live, Mr. Hansen? A. In Prairie Village, Kansas.

Q. What is your home address? A. 8806 Rosewood Drive.

Q. And your age, Mr. Hansen? A. Forty-three.

Q. By whom are you employed? A. National College Athletic Association.

Q. How long have you been employed by the NCAA? A. Fourteen years.

Q. What is your current capacity with them? A. I'm Assistant Executive Director.

Q. Would it be fair to refer to you, at least staff-wise, as the number-two man? A. No. That is not accurate.

Q. All right. To whom do you answer? A. Mr. Byers, Executive Director.

Q. It's not accurate because there is another number-two man, [4] or there is no number-two man? A. Well, there are five department heads, I believe, and none of us is senior to the others.

Q. All right. You are head of one of the five departments, then, that the head of each of which answers directly to Mr. Byers, is that right? A. Yes.

• • •

[7] Q. What are your responsibilities presently with respect to the formulation, negotiation or execution of the Football Television Plan? A. I am the Program Director for the Football Television Committee.

Q. What are your responsibilities as Program Director? A. To provide administrative support for the Committee.

Q. All right. Is that it? A. Yes, sir.

Q. How many employees assist you more or less directly in that responsibility? A. Just one.

Q. Who is that? A. James Shaffer.

Q. What are his responsibilities? A. He assists me in taking minutes of the meetings, and he has [8] also this year administered the Exception Telecast Program.

Q. That is a responsibility which you have been in charge of until this time? A. Yes, the exception telecasting, that is correct.

Q. Then, you are the employee of the NCAA that has the regular and direct contact with the Television Committee? A. The Football Television Committee, yes.

Q. Excuse me. Football Television Committee. That Committee was made a separate committee as effective what date? A. I believe it's the end of the convention because we appointed a General Television Committee, and I don't have a precise date for you, but it must have been effective with the end of the convention.

Q. 1981 convention? A. Yes, sir.

Q. Who is the administrative liaison with the General Television Committee? A. I am on that one.

Q. That is your responsibility also? A. Yes.

Q. What television events does the General Television Committee have responsibility for? A. It's to assume control of all events other than football. All activities other than football.

Q. Well, what activities other than football is the NCAA [9] associated with the television of? A. The respective NCAA championships.

Q. Is that it? A. Yes. That is the only activity in which it's engaged.

* * *

[51] Q. Were you aware that the NCAA Council was having a meeting in the middle of August, second week of August, in Gleneden Beach, Oregon? A. Yes, sir.

Q. Were you present at that meeting? A. Yes, sir.

Q. Did the topic of whether or not the CFA members who entered into a contract for televising their games over NBC might be in violation of some provisions of the NCAA constitution or bylaws was discussed? A. Would you ask me the question again? I'm sorry. You asked it wrong.

Q. Do you recall whether they talked about CFA members would be in violation of the constitution or bylaws if they entered into a contract with NBC? Was that discussed? A. That topic was discussed.

Q. Over how long a period of time do you recall that was discussed? A. No, sir, I don't recall the duration of the discussion.

Q. Well, I mean, they met for a full week, didn't they? A. No, sir.

Q. How long did they meet? A. I believe the Council met for three days.

Q. Did they discuss it on more than one day? A. I don't recall.

[52] Q. Are you prepared to say the discussion involved more than a passing reference to the question? A. No.

[There was substantial discussion.]

Q. You can't say that? A. No, sir.

[There was substantial discussion.]

Q. Did you have occasion to talk to the press about that question about that period of time? A. Yes, sir.

Q. Whom do you recall discussing that with, members of the press? A. To my recollection, Jerry McConnell.

Q. Who is Jerry McConnell? A. He is a writer with one of the Oklahoma City papers, I believe.

Q. Did you have an occasion to see his writing up of his discussions with you? A. I don't recall having seen it, no sir.

(Off the record.)

Q. (By Mr. Muchmore) Mr. Hansen, would you refer to Exhibit 9 from the preliminary injunction hearing, a newspaper article, August 15, 1981, "Oklahoma City Times". Take a moment and read that yourself, if you would. A. Okay. I've skimmed over it.

Q. All right. The first three paragraphs purport to tell what the NCAA Council did at the meeting you have just testified [53] about. Is the information in those paragraphs generally accurate as to what the Council did—well, strike the words is that accurate as to what happened. Omit the second paragraph, which is not about the Council.

MR. HARRY: Just the first and third?

MR. MUCHMORE: Yes.

THE WITNESS: Well, I can't really speak to the fourth.

MR. HARRY: He is just asking you about the first and third.

THE WITNESS: I would disagree with any—I believe that the first and the third are generally accurate. I don't know that there is a recommendation, but there obviously was some communication. That is where I am having a problem. I don't know that there would be a recommendation from the attorneys to the Council but—

(By Mr. Muchmore) "Recommendation" may be too strong a word as to whether, in fact, the administration and attorney makes recommendations as to actions? A. Yes.

Q. But other than that, those paragraphs are generally correct? A. Generally, yes, sir.

Q. And the next paragraph appears to be a quote attributed to you. I can't ask you word for word, right, but is that [54] basically what you told Mr. McConnell? A. I believe that is in general the statement that I made, yes, sir.

Q. And the next paragraph, that the Council also instructed that the infraction proceedings should be handled "expeditiously", is that correct? A. I believe that I used the word "expeditiously" with Mr. McConnell. I don't think that is the word the Council used, but that can be checked.

Q. That was your word to describe what the Council generally did whether or not they used that word? A. Yes, sir.

* * *

[55] Q. The NCAA contends that a tie-up between NBC and CFA would be a violation of its own Plan—that means the NCAA Plan, I guess—and thus make the CFA schools involved subject to penalties. Do you agree with that statement? A. I can't find it. I'm sorry.

Q. Bottom of the fourth column. A. Oh? I don't agree with the portion of the statement that contends NBC and CFA would be in violation.

Q. The distinction you are making there is that CFA could tie up with whomever they want, it's the individual school that violates by its acts, is that correct? A. That would be my interpretation. CFA could do whatever it [56] wants in terms of a contract.

Q. "The NCAA has never said what the possible penalties may be but Hansen said earlier the schools could be placed on probation and barred from appearing on television or participating in other NCAA events, such as the NCAA basketball tournament." Is that right? A. I don't recall ever specifying basketball tournament. I have on occasion, in response to media questions, responded as to what penalties are available to the Committee on infractions, which are all printed out in the manual.

Q. One of those you may have said would be they could be placed on probation, is that right? A. Yes. That is a penalty.

Q. And that would bar them from appearing on television or participating in other NCAA events, would it not? A. No, sir, it would not.

Q. Would it be a penalty available to the Infractions Committee that they could be barred from appearing on television with respect to football? A. Yes, sir, that is correct.

Q. Would it be a penalty available to the Infractions Committee that they be barred from participating in other NCAA events—and I take it that means championship events? A. Yes, sir.

Q. And that would include basketball, would it not? [57] A. Yes, sir.

Q. And wrestling? A. Yes, sir.

Q. Swimming and diving? A. Yes, sir.

Q. All the other championships? A. It could.

Q. And this could be for violation relating to football television only, is that correct? A. Insofar as the Committee has those available to it, it could be.

Q. Yes, sir. That is what we're talking about. You are quoted as saying in this case, "I wouldn't think it would take a good deal of work to discover whether or not they had violated our rule." Is that an accurate quote? A. Generally.

Q. And by "accurate", I guess I mean two things. Is that essentially what you said? A. Oh, I'm sorry. I didn't know you paused. Yes, I think that is generally what I said.

Q. And second is, is that correct? A. Well, to the best of my understanding of how the rules would be applied, yes. Or I really should say enforcement proceeding and not the rules.

Q. What do you mean when you say "they had violated our rule"? [58] What rule are you referring to? A. The Television Plan of the NCAA.

Q. Do you consider that a rule of the NCAA? A. Yes, sir.

Q. You appeared at the CFA membership meeting on August 21, 1981, also, did you not? A. Yes, sir.

Q. You and Mr. Hallock both appeared? A. That is correct.

Q. Did you discuss at that time whether members would be in violation of any of the rules of the NCAA if they proceeded to have their games televised under the CFA-NBC television contract? A. I believe I was asked the question about that.

Q. And you responded to it? A. Yes, I did.

Q. Were you asked specifically the question, "Well, okay, at what point are we in violation, when the CFA enters the contract, when we don't opt out, when we actually appear on TV?"—the question generally along that line. Give your opinion as to what point they would be deemed in violation. A. I believe that that was the general question. I don't believe they were asking for my opinion. I believe they were asking for what the Council had said.

Q. Well, okay. I appreciate that distinction. What response [59] did you make? A. I can't recall my specific response.

Q. Would you have told them that if a member commits to another television program outside the NCAA program, then, it's in violation of the rules? A. I don't recall how I responded.

Q. Is that consistent with what your understanding at that time was? A. Could you read it again, please?

Q. But, essentially, what the Council has said is that if a member commits to another television program outside the NCAA program, then, it is in violation of Constitution 4-2-(a), The Conditions and Obligations of Membership, which states specifically that the member agrees to abide by the NCAA rules and regulations, and agreement not to abide, therefore, places the member in violation and subjects it to the Enforcement Program.

MR. HARRY: May I see that a minute?

MR. MUCHMORE: No. This is nothing that has been produced at this point, Mr. Harry.

MR. HARRY: In other words, that is one of your own papers?

MR. MUCHMORE: That is right.

MR. HARRY: So, you can't see it, and if you can remember what he asked you, you can answer it.

[60] THE WITNESS: I don't know.

Q. (By Mr. Muchmore) I'm not asking you word for word. I'm asking you if that generally fits with your recollection of what you would have told the CFA special meeting. A. Well, I have answered I can't remember what I told the CFA meeting.

Q. You can't say one way or the other? A. No, sir.

Q. Was what I read you consistent with your understanding at the time? A. Understanding of what, precisely?

Q. Of what the Council had said? A. Yes. That is my understanding of generally what the Council's position was—policy was.

Q. And was it your understanding that the violation would not begin on a vote but at the time that the CFA submitted to NBC a list of participants in the CFA program, was that also

part of your understanding? A. I think it went beyond that. I think, actually, there had to be an agreement consummated to which they had committed.

(Off the record.)

Q. (By Mr. Muchmore) You were aware that a transcript was being made, or recording was being made, of what was taking place at that time, were you not? A. Yes, sir.

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[68] Q. Go ahead and look at what has been marked as Exhibit Number 2. That is an interview that you granted to a newspaper in—it appears to be Jackson, as best I can tell. Is that Jackson, Mississippi? A. It appears to be. As you say, it's very difficult to tell because the name has been cut off.

MR. MUCHMORE: Let the record show it has a zip code, 3-9 something, if that is Mississippi.

Q. (By Mr. Muchmore) They play football down in Jackson, don't they? A. Yes, sir, I think they do.

Q. It appears to be an interview with you. You can read as much of it as you wish. My questions are going to be directed toward the last three questions there, but you can review as much or as little of it as you wish. Does what appears to be an interview with you there, to the best of your knowledge, is that an accurate representation of what you told the reporter at that time? A. Well, it's at best a summary of the conversation which I obviously had with the writer.

Q. Is there anything in there you would take issue with whether you said it or even whether you meant to say it that way? [69] A. Are you now addressing the last three questions?

Q. First, I am addressing the last three questions. A. I would say that there is one particular inaccuracy, mine and not the writer's, undoubtedly. It says there is several occasions when a school has been instructed not to conduct the program

for a year or two. I believe that has been the situation twice, and I say "several". But, other than that, in general, that is acceptable.

Q. If "several" means two or more, then that is— A. If it means two period, I believe it's accurate.

Q. Is there anything you would take particular exception to in the rest of it? A. This is generally acceptable as a summary of our conversation. I think it's narrow, but that is all right.

Q. Limited space, right? A. Yes, sir.

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[82] Q. Mr. Hansen, under the Football Television Plan of the NCAA [83] in past years, and I assume in future years, although I haven't seen it, an individual institution, insofar as the contract is concerned, enters into its own contract to televise its own home games with the network, is that right? A. Yes, sir.

Q. It has been true in the past and will be true in the Plan which has recently been negotiated that those contracts must be for a certain minimum amount? A. No, sir.

Q. All right. Would you clarify that, please? A. The network—the institution, rather, is free to negotiate with the network for a price satisfactory to it. By that, I mean the home institution.

Q. It can be either higher or lower than the specified amount? A. There is no amount specified.

Q. No amount specified? A. No, sir.

Q. Well, how are the amounts generally determined, arm's length negotiation between the school and the network? A. Well, the network has the authority to pay as it sees fit, and I am not a party to the negotiations, so I can't answer more than that.

Q. You don't know whether—you don't know how the price is normally arrived at? A. No, I don't.

[84] Q. For all you know, ABC calls Wade Walker and makes him an offer, he makes a counter offer, and they haggle over it for a few days and come down to a price? A. For all I know, that can be done, yes, sir.

Q. Do you know that that was ever done in the history of the NCAA television? A. Yes, sir. We have had a number of times where the network has changed the pricing within a season or for a season, and we have had discussions—I am aware of discussions where a network was asked about a different price and agreed to discuss a different price.

Q. Now, let me break that down. The first thing you talked about, the network changing the pricing. You are talking about a general change applicable to all games, are you not? A. I am talking about the network change so it has different amounts of money to award to games that it was going to televise.

Q. You are not talking about making a change for an individual game; you are talking about making a prospective change for the remaining games, are you not? A. Well, the network's policy has been to generally have the same price for respective types of games, but it has reached a point at which it wishes to change the program that it's going to televise and receive authorization to change from the Committee and has done different numbers [85] of regional or national and thereby changed the pricing for specific games as well as their other games they are televising.

Q. Changed the price for one specific game? A. On occasion, yes, sir.

Q. When has that been done? A. Well, it is in the records. I can't tell you the year.

Q. What is the last time you remember that happened? A. Oh, it's within the last six or seven years.

Q. Now, tell me when a school ever asked for and received a greater amount than would follow under the network pricing formula. A. I was told by Jim Spence, Senior Vice President for ABC, about three years ago the Commissioner of the Big Eight Conference asked him if he would negotiate a separate price for a game of institutions in that Conference, and he told him, yes, he would.

Q. And what came of that? A. Nothing because the next question was, can we negotiate the other games, and the Commissioner declined to negotiate the other games.

Q. What other games? A. Other games being televised by ABC in that Conference.

Q. The Commissioner wanted to raise the price on several desirable games, and ABC said, sure, if we can talk about [86] lowering the price on the others? A. Essentially.

Q. And that essentially ended the conversation? A. I don't know that.

Q. But as far as what you heard? A. As far as I know, they essentially did not change prices.

Q. All right. So, my question, then, again is, do you know of an occasion when a given institution or a group of institutions asked for and received a price different from the network pricing formula? A. No, I don't.

Q. Now, is that network pricing formula, that is a negotiated matter between the NCAA and the network, isn't it?

MR. HARRY: Object to the form of the question. I don't know what the reference to formula is.

Q. (By Mr. Muchmore) Well, there is some sort of formula, is there not, that is applied week to week that determines how much is paid for a given regional game? A. No, sir, not to my knowledge.

Q. You don't have any idea how those amounts are computed? A. Well, the network does the computations. The

network pays the price, but you asked about a formula. I don't know of any formula.

Q. You don't know how the network arrives at their prices? A. Well, they obviously take the minimum aggregate and pay it [87] out as they desire over the total games that are televised.

Q. Whether they use any arithmetic means to determine how much is paid for one regional and/or another regional, you have no idea? A. No, I don't know what their considerations are.

Q. And they do that without the consultation with or approval of the NCAA? A. Certainly without the approval. They have talked to us in the past about the amounts.

Q. They do not ask for your approval on that? A. No, sir.

Q. And as far as you are concerned, they have the right unilaterally to arrange the compensation however they want as long as the individual institutions whose games are being televised go along with it? A. Yes, sir.

Q. And NCAA has no say in that, either legally or as a practical matter? A. That is my understanding, yes, sir.

Q. Well, I want to know what your practice has been. As a practical matter, the NCAA has had no say, formally or informally, in how ABC divides up this money between the various regional games? A. I told you that in the past we have discussed that with them and we have not done so recently, and so I hope I'm [88] responsive to your question. As I said, they have the total right to set the price and do so.

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[120] MR. MUCHMORE: Would you mark that, please.

(Whereupon a certain document was marked by the reporter for identification as Plaintiffs' Exhibit [121] No. 13. R.B., 11-11-81.)

Q. (By Mr. Muchmore) Would you look at Exhibit 13, please? A. (Witness responds.)

Q. Have you had an opportunity to look at Exhibit Number 13? A. Yes, sir.

Q. Is that a memorandum that you sent Mr. Byers on January 23, 1976? A. Yes, sir, it appears to be.

Q. And would you read the third paragraph of that memo, please aloud in the record? A. "First, in an action that does not require approval, but is merely reported, the Committee set the 1976 dash 1977 rights fee at $501,538.00 for a national game and $380,000.00 for a regional game."

Q. And I will ask you if it is not true that for the next year, the national games payment made was totally for each of them, $501,538.00? A. To the best of my recollection, it was.

Q. And was the fee for a regional game for the next year exactly $380,000.00? A. I don't recall that. I'm sure it's in the records and can be checked.

Q. You don't have any reason to think it was not $380,000.00, do you, that it was changed from this? A. It doesn't strike me as a number I remember, but, of course, [122] it's been a long time, so I'm not challenging it. I'm just saying I don't remember that one.

Q. Do you have any recollection of it being changed after it was set by the Committee meeting in January? A. As I have said to you, there were a couple of years where the numbers were changed even after ABC had set them, and so I don't—that is where I'm saying to you I don't remember that number.

Q. In your report here, you say, "The Committee set", do you not? A. Yes, sir.

* * *

[505] **JOHN R. MOHR**

was called as a witness by the plaintiffs, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Muchmore:

Q. Would you state your name, please? A. John R. Mohr.

Q. And would spell the last name? A. M-o-h-r.

Q. Where do you live, Mr. Mohr? A. I reside at 13840 Valley Vista Boulevard, Sherman Oaks, California.

Q. And what is your current employment? A. Currently, I am vice-president of sports programming for Los Angeles, for national subscription television, which is over-the-air, pay-subscription television service.

Q. What is the name of that service? A. Marketing name we are more widely known by is "On T.V."

Q. That's "On T.V."? A. Yes. O-n T.V.

[506] Q. Would you generally explain what a subscription T.V. service, how it's different from cable, how it's different from free T.V.? A. Okay. First and foremost, we are what they call a "premium" or pay service; there is no commercials, there is no commercial interruption, there is no editing of our product. We offer to our subscribers for a fee of twenty-two dollars a month, current motion pictures, unedited, uncensored, without commercial interruption, as well as live home sporting events which are a major part of our programming.

We differ from cable in that subscription television, by definition, technologically is an over-the-air-transmitted scrambled signal, rather than cable, which is delivered literally by a cable.

* * *

[507] Q. What cities do you operate in, in that manner, besides Los Angeles? A. Besides Los Angeles, we have On T.V. systems that we operate in Miami, Fort Lauderdale, Dallas-Fort Worth, Chicago, and Phoenix. We have an affiliate system in Portland, affiliate being we sell them or franchise them the right to use our name, and we provide them the programming package.

Additionally, there are other On systems. Detroit and Cincinnati, which are either owned by other individuals or where we have again franchised the name.

We will be opening additionally, I would say, in the next year, we plan to open in Baltimore and Houston.

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[509] Q. Would you tell the Court what sporting teams you do have on T.V. there, on On T.V. in Los Angeles? Just a list of them. A. On T.V., we currently have agreements with Los Angeles Dodgers —

Q. That's professional baseball? A. Professional baseball. California Angels, professional baseball team, I might add. World champion Lakers, professional basketball team. The Los Angeles Kings, professional hockey team. The Santa Anita Parkway, which is a racetrack in Santa Anita, I should say Arcadia, University of Southern California, and the University of California at Los Angeles.

Q. As to what sports do you have an agreement with, University of Southern California and U.C.L.A.? A. With the University of Southern California, we have the exclusive pay television rights for the Los Angeles market to all sports that fall under the athletic program, [510] with the stipulation, I — it would include football. There is a prenegotiated rights fee with the University of Southern California for football telecast. However, the rights are subject to N.C.A.A.-two approval, because of current restrictions on the contract.

Q. More about that later. What about U.C.L.A.? A. The University of California, Los Angeles, we have specifically television rights to basketball games, predetermined amount of basketball games, as well as football and other sports events. We have a first right of refusal on a first right of negotiation, if you will. We didn't get too involved in the football negotiations specifically because of the fact that it is very difficult to clear an exception telecast, and if we were able to clear one, then we would deal with those games on an individual basis. But we do have a first right of refusal.

* * *

[512] Q. I should have asked, during the day until seven o'clock p.m., the station broadcasts like any other free television station? A. That's correct.

Q. And it's a U.H.F. channel, did you say? A. Channel Fifty-two.

Q. With respect to the televising of the events of the University of Southern California and University of California at Los Angeles, and specifically first relating to football, what has your experience been as to the number of University of Southern California games that you have been able to televise in the five years that you have been there? A. In the five years that I have been with On T.V., [513] we have had — actually, the U.S.C. agreement has been in effect for the past three seasons. During those years we have been able to televise under the exception telecast, I believe it's four games.

Generally, every year I take the U.S.C. and the U.C.L.A. football schedule and analyze it within the requirements of the exception telecast, and then I sit down with the universities and we prepare necessary documents to request an exception telecast.

Q. Well, let me ask you, if it were not for the exception telecast policy that you referred to, and about which there has

been testimony in the case, what would your desire be insofar as televising of U.S.C. football games? A. As far as U.S.C. football, we would like to televise every game, home and away. The nature of our business, television programming, is highly competitive, and one of the reasons that we believe we have been so successful, not only in Los Angeles, but in the fact that we are the largest single system, is our sports program.

* * *

[517] Q. Would you explain to the Court your basis for your statement that the demographics are different on college football? A. This comes again from our Neilson ratings. Our Nielson ratings not only break down — they break down the amount of our subscribers watching, and they break it down by age and sex, demographically. And we have found that college sports — in fact, let me say this: all sports, first and foremost, all our sports rate extremely high. They rate very high in the area of men twenty-five to forty-nine, which is critical to us, because generally, that's the decision-maker in our marketing strategy as to whether to buy On T.V. [518] College sports rate a little differently. The percentage of viewers that watch is still very high, but we also pick up a demographically different audience, different mix. We pick up women, and we pick up teen-agers. We believe that college sports are very different than professional sports, in that there is a different base of sport, alumns, students. There's more pageantry, more color. We found this at this point in basketball, and with a little experience in football.

* * *

[535] Q. Mr. Mohr, do you have an opinion, generally, as to all the sports that you deal with, as to what the effect of television exposure is on attendance over a period of years? A. I have experience. I have an opinion, and so do the teams: no impact. In fact, in the last five years the Los Angeles Dodgers, the

California Angels, have increased in attendance every year, and we continue to do a reasonable amount of home games.

You know, most of the teams—and as I say, I deal with this on an—on a recurring basis, they feel that the television exposure and the television promotion, the ancillary benefits of that more than helps them, if not on the game that we are doing, on the rest of their games.

Television is the most powerful means of selling your [536] product, whether it be an advertising product, or—or a piece of programming. And in the case of all of our teams, including the schools, they feel that the marketing exposure that they get from On T.V. is paramount in helping them sell tickets to additional games.

In the case of the schools, they feel it helps recruiting. They feel it helps the stature of not only the athletic program, but consequently, the image and stature of the university within the market, which they feel also helps them in getting quality professors.

Q. Mr. Mohr, there has been some concern expressed that if television of college football were unregulated, that the super-popular national game might drive contests of lesser national importance off the television screen.

From your familiarity with the markets in Miami, Dallas, Chicago, Phoenix, Los Angeles, and these other cities, what is your opinion as to what the interest would be if college football television were not regulated as to the type of games, the interest would be in those cities? A. My belief is if the schools control their own destiny in and beyond the three network telecasts, whatever it happens to be, that they are very capable of it. I believe that—I don't believe that college football will be impacted at all.

I feel that as college football is exposed on a live [537] basis — and generally, as I said earlier, would be done prominently in local markets.

Q. That's what I wanted to know; what kinds of games you would be interested in in those markets? A. I think one of the concerns, the primary demand will be local and regional telecasts. I don't really see a situation in Los Angeles where you have got, you know, fifteen or sixteen games coming in crossing the river.

First of all, there isn't enough distribution. If U. S. C. is going to be on live, and U. C. L. A. is going to be on live, and possibly Long Beach State, there is only so many stations available. And I am not convinced that from a commerical television standpoint, that they are going to be looking at television stations at additional network games.

The primary thrust will be the exposure and marketability of the local and regional telecasts.

Q. Then I want to know whether you think there will still be a demand for a local game, if there is a glamorous game available? A. Higher demand.

Q. Pardon me? A. A higher demand. We have found that in the exception telecasts that we have done in the four or five games — and I am not sure, either four or five — we have done games when the network game not only was head-to-head, sometimes, [538] you know, we may be on, as an example, from eleven to two a.m., and the network game may come in from ten thirty to one.

More often when we do an exception telecast, we are competing with the network game, and our ratings to our subscribers are consistent, whether we are head-to-head with a network.

* * *

Cross Examination by Mr. Harry:

[545] Q. Now, would you detail for the Court your testimony that programming is highly competitive, Mr. Mohr? And by that, I mean to direct your attention to the kind of program-

ming that competes for air time. A. Okay. My statement about — I can cover that. When I say "highly competitive," I mean — what I meant by [546] that was in acquiring rights.

It's also, of course, highly competitive in the choices that a subscriber or viewer has. The key to television, basically, is programming. Subscribers and viewers watch programming, they don't watch stations. When I go and try to acquire a Dodger game, I am competing not only with other pay systems or cable systems, but once I make the acquisition of the product, from a programming standpoint we are competing with seven other stations in the market, commercial television stations, to say nothing of the other satellite-fed cable networks.

Q. And is there an abundance of sports programs in the Los Angeles market for showing on T.V.? A. There's an abundance of nonlocal, live. If you are talking football.

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[547] Q. Now, you said that you had balanced programming, and I want to pass that, and that you used in your programming a little bit of a lot of things. I would like to explore that.

Does that mean that you intersperse other kinds of programs with your sports, that — either movies or specials, and things of that kind? A. Yes, that's correct. The balance — we have balanced programming in two areas. One in our overall programming; it's movies, specials, and sports, which — local sports, which are balanced.

And I also meant — I used the word "balance," as it relates to my area, sports programming. We try not to emphasize too heavily, because we are a prime-time service, and because we are a one-channel service. And if we put on too many baseball games, for the nonbaseball fans we are [548] taking away movies. So we look at an overall balance and mix of our sports programming, as well.

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[550] Q. (Mr. Harry, continuing.) The testimony that I wanted to turn your attention to concerns your opinion on the effect of television on the game attendance, if you recall that general area? A. Yes, sir.

Q. Now, were you primarily testifying in those questions — in that area; that pay T.V. did not affect the game attendance? A. Yes, sir. I think commercial T.V., I don't know —

* * *

[557] **IRA HORROWITZ**

was called as a witness by the plaintiffs, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Muchmore:

Q. State your name, please? A. Ira Horrowitz.

Q. Where do you live, Doctor Horrowitz? A. 2815 Northwest Twenty-first Avenue, Gainesville, Florida.

Q. What is your profession? A. I'm an economist and professor in the graduate research currently at the University of Florida.

Q. What is your educational background in that area? A. I hold a bachelor's degree in economics from the John Hopkins University. I received that in 1955. I received a PhD in industrial economics from Massachusetts Institute of Technology, in industrial economics, in 1959.

Q. What previous academic positions have you held? A. Well, after receiving the PhD in 1959, I spent a year with Midwest Research Institute as an operations research analyst, and then I took my first permanent full-time academic position at Indiana University in 1960, as an assistant professor of quantitative methods, and I remained at Indiana University until 1972.

[558] I went from assistant professor, to associate professor, to full professor. I had a one-year leave for research appointment at the Catholic University of Louvain, in Belgium. And then in 1972, I left that university to become chairman of the planning department at the University of Florida, and I —at the University of Florida, since I remained as chairman for six years, and I had a one-year leave in 1975-1976, when I was employed as senior economist at the economic policy office of the antitrust division of the Department of Justice.

After I resigned as chairman of my department in 1978, I spent one year at the School of Business at Michigan State University, and then I returned to the University of Florida as graduate research professor in 1979.

Q. Are you involved with any regular publications? A. Well, in addition to being an author, I am the editor of a journal, *Decision Scientist.* I have been the editor for five years, it's my second of two three-year appointments, I finish up next year. I'm also on the — I have been on the editorial board, that term is now ended, *The Academy of Management Journal,* and for some time I have been on the editorial position of *The Journal of Industrial Economics* and *The Journal of Business and Economics.*

Q. What about individual publications? A. My publications, I published, authored, or co-authored three books on one monograph, and perhaps something in that [559] neighborhood of seventy articles.

Q. And these are all related in one way or the other to the general area of economics? A. Yes.

Q. Do you have any particular areas within the field of economics that you have specialized in or devoted more time in than others? A. Well, with the field of economics, as we construe it, is broad enough to include business — well, within that area, my teaching for the last several years has been in the area of what we call quantitative methods in business, on management sciences, and that requires me to teach in the

areas of statistical decision theories, mathematical programming, which are a variety of quantitative methods that we use to help solve business and economic problems. My major —

Q. Those are all part of management science? A. Yes, they would all be part of management science or quantitative management science.

Q. And explain what management science is. A. Management science is the scientific approach to the management processes, as opposed to viewing management as an art, as well as traditional, in the area, so you — sophisticated quantitative techniques, for example, to help us solve various management problems.

Q. All right, sir. Do you have any other areas of [560] specialization? A. Yes, my major research interest within the last, I suppose, decade, if not longer, has been in the area of industrial organization and industrial economics. And in particular, in recent years, I have been principally concerned with the problems of self-regulation in the professions, potential competition both in economics and as it relates to antitrust issues, and problems with market — issues of market definition and decision-making in antitrust, in general.

Q. Would you clarify what areas of economics as relate to antitrust problems that you have devoted time to that you have specialized in? A. Specifically, as — the area of potential competition.

Q. Potential competition? A. Yes, sir.

Q. What else? A. Market definition, and over the course of the last twelve years, I have spent a lot of time studying the issue of sports broadcasting, as a problem which the government and—has shown some interest.

Q. What do you mean by "sports broadcasting"? A. Well, specifically, the telecasting of professional and collegiate sports and the economic issues related thereto.

Q. Has that been in an antitrust context, at least in part? [561] A. At least in part, yes.

Q. Specifically, what experience have you had in that area as far as dealing with the specific lawsuits or with the government? A. Well, with specific respect to sports broadcasting, I was employed as an economist in two different antitrust actions, and at the time that I was with the economic policy office at the antitrust division —

Q. Of? A. — of the Department of Justice, U.S. Department of Justice, there were — I can't recall, one or two instances, perhaps more, when issues were raised about the possibility of bringing antitrust suits in the area and I was brought in to consult in those days.

Q. Have you testified before Congress on any of these matters? A. Yes, in terms of the professional — in terms of sports broadcasting, I testified before both houses of Congress and I have been invited to and submitted statements, I think, to both houses of Congress, when various sports bills were considered.

Q. And in the antitrust area, generally, what experience have you had in your dealings with the government? A. In the antitrust area, in general, I indicated that I was employed with the antitrust division with the U.S. [562] Department of Justice for about fifteen months. I also was subsequently a consultant on a project or two. For the last several years, I have worked on—that is, perhaps the last three or four years, I have worked on several different cases for the Federal Trade Commission. I have also been profitably employed in antitrust suits, various antitrust cases, by numerous law firms, as well as for a couple of years by A.T.&T., in connection with the A.T.&T. case.

* * *

[566] Q. Would you explain, please, for the Court, what the five dimensions that you mentioned to the relevant market are, give an idea as to how they apply in determining that concept?

A. Yes. The five dimensions of the product that is included—the product that is traded in the market; the geographic area within which the product is traded; the time period over the course which the product is traded, short-term, long-term or whatever; and the buyers that buy in that market and sellers—or that are affected one way or the other in the market; and the sellers that sell in that market.

* * *

[570] Q. But let me ask you, generally, if you would, to discuss the function of the time market in making the—this determination before we go on to the product market? A. Well, there are—there are several different aspects of time here. One aspect is the fact that whether things are traded every day or every week or every year, in general, in—when speaking about the television market—television as a market, contracts are on—for individual programs are either on a thirteen-week basis or twenty-six-week basis or thirty-nine-week basis or one-year basis or a two-year basis, so that one aspect of time is the number of trades that the time period between the transaction.

The second aspect of time, of course, is the fact that the television week divides itself up into seven days, and in terms of the television viewer's choice, the viewer has to make a choice on each one of those seven days. And that becomes an interesting issue because that makes the televised product what we call a perishable—what Congress called a perishable product; that is, if you don't watch the college football game on Saturday afternoon, you do not have the opportunity to watch that football game except if it's television replay, on Sunday afternoon. You can't—you can't save the product for another day.

[571] Q. And when are college football television games played? A. They are typically played on Saturday afternoon.

Q. Does that become a function of the time parameter of the relevant market, then? A. Yes.

Q. Would you explain the significance of that, Saturday afternoon college football time? A. Well, the significance of college football being played on Saturday afternoon is that — is twofold. First of all, it influences the audience that might be available for watching televised college football, it's a different audience than might be available if college football were played on Wednesday afternoons, for example.

A second aspect is because college football is played on Saturday afternoon, whereas professional football, which is the logical thing that one might think of if we are going to put two products, two candidate products in the same market. Professional football is played on Sunday afternoon, and by—for the professional levels, they retain their antitrust exemption, they are not permitted — that is to broadcast — their antitrust exemption to broadcast, they are not permitted to televise on Saturday afternoon. That means there is a de facto division of those two candidate television markets. You cannot televise — that is, professional football [572] telecasts cannot compete with college football telecasts and vice versa.

Q. Does that have an influence on your determination whether they are in the same relevant market or not? A. Yes.

Q. And in what way? A. Well, they can't be — they can't be in the same relevant market if the view — if the viewer is the ultimate determinant of the demand doesn't — can take advantage of both at zero cost; that is, the viewer doesn't have to make the choice of writing either the college football game or professional football game, the viewer can choose to watch either, or the viewer can choose to watch both with respect to the time dimension, that's a pertinent aspect.

Q. Is there any dispute or problem in this case as to whether the dimensions are of buyers or sellers, is that a point of contention here? A. No — well, we can look at the buyers in various ways, but the first buyer of the television rights and the broadcasters, and the sellers, in this timecast, the N.C.A.A. is the single seller.

Q. N.C.A.A. is the single seller? A. Single seller, yes, sir.

Q. Now, would you then explain to the Court, as to the area of the product mentioned in the market that is [573] mentioned here, what your determination has been and more particularly, what your process has been in making the considerations that you have given in making that determination? A. Yes. My determination is that televised college football is the relevant product and the considerations that I have given here are the same considerations that one would always give in determining relative product.

Q. Tell us what the general considerations are that an economist gives in every case and then particularize them for this case. A. Yes. In every case, we looked for both supply conditions and demand conditions, and we looked to determine what there is, close substitutability or perhaps more pertinently put, production flexibility on the supply side and — or whether there is another candidate product that is a close substitute on the demand side. And we attempt to — in theory, we would look at those two issues by considering on the one hand, the elasticity of supply on what is called the cross elasticity of supply, and on the other hand, the cross elasticity of demand.

And as a practical matter, in dealing with these, we discover two things. One, it's that the cross elasticity measure has some flaws with it, in dealing with it empirically; that there's a good deal of difficulty in measuring the cross elasticity in any event that the data are normally not available [574] to permit use to get a cross elasticity, so what economists generally do in this case is look at various proxy measurables that have other data that permit us to draw inferences about cross elasticity of demand and supply.

And generally speaking, the other things that we look at are the same sort of market indicia that were enumerated by the Court, in *Brown Shoe,* such as specialized customers, distinctive uses, production flexibility, extensive differences in price and so forth.

Q. You say that you can't go in with some measuring device and determine exactly and put it on your calculator as to what the cross elasticity on demand is in the ordinary situation? A. In some situations, if — if we had enough — if we had enough data and some ideal situations we could do it. In most situations, we can't do it, that's correct.

Q. And if you had all the data theoretically, you could make a calculation and come up with a number? A. That's right.

Q. Does that sound right? A. That's correct.

Q. But in this instance, it's your testimony that it is not possible to operate with that provision? A. That's correct.

Q. Now, explain what that is, please. [575] A. Well, that's the case for several reasons, but let me just give an illustration, by talking about what the cross elasticity of demand is, and I think that will make an issue clear.

Q. Please do. A. The cross elasticity of demand is intended to reflect the sensitivity of the demand for one product to small price changes in a second product; an economist talks about the small price changes, or prices they mean, in this prose, elasticity context, there is a price increase of perhaps one percent, so when we talk about cross elasticity demand, what we would be—the kind of question we would be asking would be the following—if we're talking about any product in general, we would ask the question, what is the percent change in quantity demanded of product "A" as a result of a one-percent change in the price of product "B"?

And then vice versa; what is the percentage change in demand of product "B" of a one-percent change in the price of product "A"?

If, in fact, what we — what we discover is that the demand for product "A" increases when the price of product "B" — when the price of product "B" rises, then we — then we

would say those two products are substitutes; that is, when one price rises, we shift our demand to the — to the second product.

[576] Now, the —

Q. If Safeway raises their prices nine hundred dollars, and people buy more foods, then they are in competition, is that right? A. Well—

Q. I mean, that — ninety dollars. A. Well, no, ninety dollars is in some sense too big, also, because in that sense, you see a lot of kinds of products compete, for example, two well-recognized products, two products that are recognized in the courts are beer and wine; that is, a series of cases in which beer has been recognized as a relevant market, and some in which wine has been recognized as a product market.

Now, I know many people that don't drink either beer or wine, I know many people that drink beer, I know many people that drink wine, I know many people that drink both beer and wine. But those are nonetheless separate markets in the sense. If one is faced on a given evening between buying a bottle of beer at dinner for a dollar fifty, or buying a bottle of wine for ten dollars, on — on one occasion might choose beer, and the next time choose wine, but if the price of beer, instead of one fifty, would rise a one cent, one percent, and become one fifty-one or a dollar fifty-two, it is not determined that the person that was buying the beer would switch to wine, but if the beer were [577] to go from one fifty-one, and increase up comparable to your -- to your chevrolet and, say, six dollars and fifty cents for beer, and ten dollars for the bottle of wine, that might be sufficient to cause the beer drinker to switch to wine, so that when we talk about —

Q. But not sufficient for the economist to say, "You are in the same" — A. That's correct, not — not for the economists or courts to say they are in the same market, nor that they are substitutes, as we talk about substitutes.

Q. But if the price of one beer went up a few pennies, would that affect the sales of another beer? A. Well, it depends on the many, many — in many cases, the answer —

THE COURT: Mr. Muchmore, would you let the witness finish his statement, please, sir?

MR. MUCHMORE: Yes, Your Honor, I should be doing that.

A. Yes, in many cases, the answer, of course, is, yes. If one guy goes out one evening and discovers that Budweiser is a dollar-and-a-half, and Miller Lite is a dollar-and-a-half, depending upon your preference, you might flip a coin or tell the waiter or waitress to bring you either, and you go in the next night and discover that Miller's raised to a dollar fifty-five, and Budweiser is still a dollar fifty, [578] you might then order the Budweiser, so in a sense, those are in the same market.

Q. Is your hesitation, when I said, "all beer," because the price of Heinken's changes, that may or may not increase the price of Budweiser? A. Yes, that's also true, and it is also a little known fact that saki is defined as a malt beverage, so perhaps in the same market, in some sense —

Q. Would you proceed, then, with your analysis of the — I think you were explaining — A. Yeah.

Q. —how it is that cross elasticity cannot always be measured and what it means and perhaps then we can particularize that to the college football question? A. Yeah. Well, in—well, to particularize in—so about what we need, then, in order to measure cross elasticity is some lengthy history in order to separate the various factors that impact on the demands for products. We need some lengthy history of transactions and lengthy history of data.

In this specific instance, however, we have neither the exact things that—the exact data we want, nor do we have a lengthy history, so if we are talking about who demands college television football, we can look at that in two or three different ways.

[579] The ultimately—what we are—what we are interested in—interested and concerned with is the consumer, and consumer is the demand for college football. The consumer does pay for college football. A consumer is not directly charged for watching a telecast, so we don't see the consumer who turns on the television set and pays the same zero price for turning on college televised football today, as he paid fifteen years ago. So that we don't have that kind of price data to estimate the consumer's cross elasticity for product demand, but we do know that what—what advertisers are willing to pay for college televised football, and advertisers are going to pay for college televised football because they want to be able to send their messages to consumers.

So the advertisers for that—it's derived from the demand that the consumers have. Similarly, the networks and individual broadcasters demand—the demand—the broadcast rights for college televised football, they can sell those televised rights via commercial messages to advertisers, so that we have two different derived demands, but now our problem in looking—in attempting to measure cross elasticity using the prices that—using the prices that are charged to either advertisers or the prices that are charged to the networks is that we do not have the necessary lengthy series of prices that permit us to measure—to measure elasticity.

So that if we're talking, for example, about measuring [580] the cross elasticity of, let's say, meat or fish, we can have — we have — a subject that I have done some work with, we have monthly figures on the price of meat, monthly prices on the average price of fish, and so forth, and we have a series that goes back twenty some odd years, so we can have several hundreds of observations and attempt to use sophisticated econometric techniques to measure these cross elasticities.

When we're talking about the price of college football, however, what we have are a series of two and four-year contracts, prices changing every couple or every four years, we

have — it is not clear what advertising rates are, and those are sometimes up on a one-year or two-year basis and so forth, so we just don't have the data available.

Q. Would you tell the Court, then, with the specific data not available, how you have proceeded to make a determination as to the elasticity of supply or the substitutability or whatever the phrase, in this instance? A. Well, with respect to the cross elasticity of supply, there is really not much of a problem. That is to say, on the one hand, the people that are producing other candidate products, other kinds of television programs, for example, yesterday in Court, professional baseball was mentioned, the Marty Lamore Show was mentioned. The people that are providing professional baseball cannot provide college televised football on Saturday. The people that are [581] producing the Marty Lamore Show cannot provide college televised football on Saturday. Similarly, the seller of college televised football, namely the N.C.A.A., cannot, to the best of my knowledge, produce either professional major league baseball, nor can they produce programming comparable to the Marty Lamore Show.

Q. You're talking now about the elasticity on the supply side? A. On the supply side, yes.

Q. And it's also necessary, then to analyze it on the demand side? A. Yes.

Q. And, in fact, that's what most of the discussion has been about, has it not? A. Yes, most of the previous discussion before in court has been related to, at any rate, the cross elasticity on the demand side, and as I indicated, I have been interested in this issue and gathered data and looked at data and analyzed data on this issue off and on over the course of the last twelve years.

The particular data that I have gathered and looked at have been data on such things as broadcast rights, who sponsors college television — college television football, who

sponsors other professional sports — other televised sports, and who sponsors other television programs?

[582] These data have been gathered from sources such as in a particular broadcast magazine, and I have also looked at the various Nielson reports that have provided me with data as far back as 1964, and as recently as 1980. The Nielson Company puts out annually a book of data that's called — the titles change over time, it's called something like a "Look At Sports," and these are very detailed data that have ratings, some cost figures, demographic figures for televised sports, in general.

The Nielson Company has been very nice to me over the years, and when they subscribe to the service, in order to get it regulated, but after the data becomes out of date, if I want the data, they will be nice enough to let me have them, so that the most recent data I have on that is 1980, but the data I have looked at go back as far as 1964.

Q. You were saying, then, that you have given this specific question to the relevant product market, college football television and elasticity demand, is one that you have given attention to over a period of years? A. Yes.

Q. And would you tell the Court, first of all, had you reached a conclusion prior to your being retained on this lawsuit? A. Yes.

Q. Would you tell the Court what that conclusion was [583] and then with specificity, would you refer to what you have learned from each of those sources that you spoke of as to the broadcast rights, the sponsorship and the ratings; detail what has led you to the conclusion that you have reached? A. Would you mind repeating just the first part of that question? The rest, I think I have.

Q. I think I first asked you to state what conclusion you have reached — A. Yes.

Q. — prior to your being retained. A. The conclusion that I reached is that college televised football is a recent market.

Q. And specifically as to the elasticities — A. Yes.

Q. — of supply or of demand. A. Cross elasticity, specifically with respect to the — actually, the two happen to be related, but specificially with respect to the cross elasticity of demand, that as far as television viewers are concerned, as far as sponsors are concerned, the television viewers viewing television on Saturday afternoon, on Saturdays, as far as sponsors that are seeking to sponsor on Saturdays, and as far as the networks are concerned, that there is no close substitute for college televised football.

Q. Now, would you have testified to the things you [584] looked at, broadcast rights, sponsorship, ratings — now, would you please tell us what you have seen when you have looked at those things and how it leads you to the conclusion that you have reached? A. One of the first things that one does is one looks at the programs that are telecast on a Saturday afternoon. I have done this over the course of not — not every year, but of several years, let's say, from 1971 through 1981. I did this with specific respect to this case because I was curious as to what's on, on a typical Saturday afternoon, and my own impressions of it. And I did this looking at New York and Chicago, being two typical and large television areas.

And on a Saturday — typical Saturday afternoon, in New York City, you will get the — at the time that televised college football is on, you will get on — I can't remember which network, N.B.C. would have — C.B.S. would have Bullwinkle; N.B.C. — which is a cartoon program, I understand N.B.C. might have the Tom and Jerry Show, which is a series of comedy shows; the independent stations might run a movie or some rerun of "I Spy" or some such program.

So the initial suspicion that one has is that the typical television viewer that would be watching college football would

not typically switch to — would not typically be interested in watching Tom and Jerry, for instance, or [585] Mr. Bullwinkle or the eight reruns of "I Spy," so one asks the question, if you kind of think that, let's look to see who sponsors typically the television programming in general and let's look to see who sponsors the college televised football?

And in 1981, for example, a broadcasting magazine listed as the five principal — as what they — when they give a list of major sponsors of televised sports, the college — college televised football, the five companies that they listed were Chevrolet, Miller Brewing, Schlitz Brewing, Anheuser Busch and Texaco.

In the past, the kinds of names that popped up in addition to those names are companies such as Goodyear, insurance companies, United Airlines, this kind of thing. The judgment that one — that one — now, these companies are kind of interesting in the sense that if you look at the largest sponsors of network programs, these companies don't necessarily fall into that category, so that the largest sponsor of network television, in general, is Proctor and Gamble. Proctor and Gamble doesn't — does not appear on this list because they appeal to an — and they are interested in getting their messages to a different kind of audience, namely they are interested in getting their messages to audiences for programs at the same time on Friday afternoons; that is, the audience that watches "The Young and the Restless" and "Doctors" and [586] "Mike Douglas" and kind of programming that typically appear on a weekday afternoon.

In terms of an inference that one makes about the cross elasticity of demand, we look at the price that, let's say, the Miller Brewing Company is willing to pay to sponsor the college televised football, and according to the Nielson data, the average — the average price for a thirty-second slot on college television football on Saturday afternoon in 1980, was forty-seven thousand nine hundred dollars for a thirty-second slot.

Logically, one doesn't consider that the Miller Brewing Company — if the price moved up by one percent and became — instead of forty-seven thousand nine hundred, it became forty-eight thousand four hundred, one cannot see the Miller Brewing Company shifting their sponsorship to Bullwinkle or Tom and Jerry, nor can one conceive of Miller Brewing sponsoring Tom and Jerry, or Bullwinkle.

So logically, we would not think of those kinds of products as substitutes. So what we look at, we ask the question, what does it cost—what does it cost the sponsors to sponsor college televised football? And there are other kinds of sports programs that might be logical candidates to be in the same market as college televised football. Is college televised football indeed distinctive? Not just in terms of kinds of companies that are sponsoring it, but what [587] those companies expect; that is, audiences that the companies want to reach, the television viewer, and what one discovers is that it is expensive to televise college televised—to sponsor televised football, but that these companies are willing to pay the price, which indicates that televised football is a—is a distinctive—is a distinctive product.

What makes it a distinctive product?

Let me answer that—that question by taking the second candidate sport that one might think is somehow comparable to televised football. If one is going to try to draw some comparability between sports—and yesterday, the issue was mentioned of major league baseball.

In 1980, the cost of televising football, as I indicated, the cost of a thirty-second slot was forty-seven thousand nine hundred dollars, that's a lot of money. The cost of televising major league baseball on Saturday afternoon during that same season was seventeen thousand one hundred dollars, for a thirty-second slot.

So that the sponsors of college televised football are willing to pay considerably more per thirty-second slot for the privilege

of televising—televising college football versus what they are willing to pay for the privilege of televising major league baseball. Now, there has to be a reason why they are willing to pay more, and the most obvious of those reasons is that college televised football gets a [588] larger audience than does major league baseball, but that's not the whole reason, because if we look to see what is the cost of televising college—of televising college football versus televising major league baseball, the cost per thousand households reached, which takes into consideration the viewing factor, the cost of televising major league baseball in 1980, was five dollars and—I'm sorry—cost of televising college football in 1980, was five dollars and thirty-five—five dollars and thirty-five cents per thousand homes reached.

The cost of televising major league baseball was three dollars and four cents per major league—per thousand homes reached; that is, it cost seventy-five percent more per thousand homes reached to televise college—to sponsor a football sponsorship versus a major league baseball sponsorship, and now we again have to ask the question, why is it that these companies are willing to pay more to send their message to a household that is watching football versus a household that is watching baseball? And the answer has to be because of the demographics. The difference is in the audiences that are watching it, too, and this is true with respect to all sports, as well as with respect to all programming.

If we stick to the major league baseball example, since that's where I started, it turns out there are two things that are true with respect to the college—the audience for college football. One, as has been previously indicated in [589] court, is primarily a male audience; that is, in 1980, fifty-six percent of the viewers of college televised football were males above the age of eighteen. Within that category of the males above the age of eighteen, something like fifty-five percent of that group were males in the age category twenty-five to forty-nine; that is, the males that have the—that is, the people that have the principal buying power.

If we look at major league baseball, the proportion of males, the proportion of males is slightly less in proportion of women is much more, because of the teenage audiences, but there's a large portion of women, generally speaking, that like maybe good league baseball, as opposed to college football, and it turns out a male percentage of those people is in the twenty-five to forty-nine buying group, than is college football so that college football has a better age distribution from the standpoint of this particular group of sponsors.

The other very interesting kind of data that one looks at are the income—is the income distribution of the households that tune into these games, and that's what really is a very fascinating kind of subject here.

If we look at major league baseball, for example, and specifically during 1980, the television ratings by which were discussed in court yesterday, if we look at households of less than ten thousand dollars, which it turns out there are considerable number of those, if we look at households of less [590] than ten thousand dollars income, the average rating for major league baseball during the Saturday afternoon, during 1980, was a rating of seven point three; that is to say, seven point three percent of most households with income—of those television households with less than ten thousand dollars of income, tuned in major league baseball.

If we look at the income group between ten thousand and fifteen thousand, the figure is seven point seven percent. If we look at the figure of fifteen to twenty thousand, the rating is seven point five percent. And if we look at the over-twenty-thousand-dollar income, the television rating is seven point three percent; or, in effect, major league baseball draws a rating of somewhere around seven percent, seven point five percent, and that's overall distributed incomes.

If we look at those precise income categories for college televised football during 1980, in the income below ten thou-

sand—households below ten thousand, the Nielson figure for Saturday afternoon is seven point two percent rating. If we look at income between ten thousand and fifteen thousand, the Nielson rating is ten point eight. If we look at the income level between fifteen thousand and twenty thousand, the Nielson rating is fourteen point three. And if we look at the income of households above—if we look at the ratings for households above twenty thousand in income, the rating is fifteen—fifteen point three.

[591] So that the difference in the income level of the viewers of college televised football versus major league baseball is considerable; that is, it's a different set of households, a different set of viewers that are watching the two things, and that's the reason that sponsors are willing to pay so much more for getting their messages to the football audiences, as opposed to the baseball audiences, is that it's a more affluent audience, a greater percentage made up of males, and it's males that have income.

That's why Miller Brewing, for example, is perfectly delighted to show their commercials on college televised football, they have over-the-hill, athletes and very pleasant messages to the rest of our over-the-hill, athletes, that are watching college televised football.

Now, I just brought up the baseball example because that happened to be mentioned in court yesterday. I brought up 1980, because that's the most recent set of figures that I have available, but give or take a percentage change, depending upon contract years and so forth, that's the descriptive of, say, the college televised football and major league baseball. There would be different — excuse me, a different kind of demographic structure for other kinds of televised sports.

Q. And those are the factors that led you to the conclusion that you reached as to the product market even before you reviewed the materials in this lawsuit and heard [592] the testimony? A. Yes, sir.

Q. Have you seen in the course of your preparation for the lawsuit and in the course of being in the courtroom, additional data that you consider relevant to the question of relevant market? A. Yes.

Q. And would you tell the Court, first, whether that has affected your conclusion, supported it, diminished it, and then would you explain what the data is and what effect that has had on you? A. All the data that I have seen and all the testimony that I have heard simply supports the conclusion that I previously reached. Data specifically with respect to Oklahoma City, and viewing habits in Oklahoma City, indicating a larger percentage of television audiences for college televised football is the older male group versus other kinds of programming. The fact that these viewers don't watch — that these viewers are not necessarily the same viewers that watch prime time or six to seven thirty television programming and vice versa, and data with respect to the price — the advertising rates in the — I believe it was the advertising rates for college televised football versus — per viewing point for college televised football versus the cost of televising the other programming that was on at comparable hours on Saturday, [593] indicating that these are separate — separate audiences with different interests, watches the two programs and differs — might be some overlapping sponsors, but basically, sponsors attempting to appeal to a particular kind of audience sponsored televised college football.

Q. Thank you, Doctor Horrowitz.

Now, on the question of the anticompetitive effects of the arrangement, generally, what — briefly, what conclusion have you reached in that regard? A. The basic anti — the basic anticompetitive effects of the agreement is that — or the current broadcast arrangements are that they serve to raise price, price paid for television rights. They restrict output, they restrict the amount of college — not amount of televised football, and they restrict the viewer's choice.

It limits the games that the viewers can watch, which are different from those games that they might watch under competitive market.

Q. Have you made a determination, by the way, as to whether the N.C.A.A. does have market power or monopoly power in the relevant market that you have determined? A. Oh, yes, they are — they act — for broadcasting purposes; that is, for the purpose of selling broadcasting rights, the N.C.A.A. acts as a cartel, it is a monopoly, it is the single seller of those broadcast rights. As the [594] single seller, they have market power.

Q. And do they have the power to influence the price that the product is sold? A. They certainly do.

Q. And what do you base that conclusion on? A. They are — well, based on the conclusion they're a monopoly. They sell what is literally the only game in town, and they are selling a product which has demand — I measured the — I haven't measured the elasticity of demand, but they are selling a product that people want and people are willing to pay for.

Q. Now, there has been a suggestion or contention that there are benefits that flow from the college football program. Would you comment, generally, on the real or perceived benefits of a situation of this type? A. Well, it's certainly true that there are beneficiaries from this program. In this sort of arrangement, some people gain — some gain, some lose, and some gain or lose more than others. I have indicated the principal losers in this are the consumers who have the restricted output, suffer the restricted output and suffer the diminution of choice. Initially, they lose in that respect.

Insofar as the television rights payments are larger than they might otherwise be, that isn't, insofar as the cartel, as affected the sale of broadcast rights, so sponsors pay [595] more than they might otherwise sponsor, and insofar as sponsors end up paying some portion of that higher, to the extent

that sponsors can, in fact, pass on a portion of those higher advertising expenses on to consumers, then we are all losing in that respect.

It's also true that there are some schools that are participating in this arrangement that are losers; that is, schools that might, if they were let on their own to sell their television rights in a free market, schools that might do better selling on their own than they would do in sharing in the N.C.A.A. plan. Schools such as — take Oklahoma, comes to mind, that's been talked about today and yesterday. Historically, Notre Dame, for example. I would not be surprised if Norte Dame were able to have a television impact, so there are some schools that might lose some, and there are some schools undoubtedly that benefit from this.

That is, there are some schools — well, to go back — regional schools that might appear on television might lose something through this thing.

Q. Let me ask you — A. Yeah.

Q. — about that, you did — A. Yeah.

Q. — refer to O.U. as a loser perhaps under the plan, but you said that schools that might appear on television [596] that don't, you weren't including O.U. in that category? A. No.

Q. Would you explain to the Court, based on your experience and study of broadcast sports, how you analyze it as to what kind of schools might appear more than they do now, and why that would be? A. Yeah. Yeah. The kinds of schools that might appear more than they do now are the—let's say, the middle range of schools, of — schools that are not necessarily football — well, that might be small schools, as well as — I attended John Hopkins University, for example, and our big rival was Western Maryland. Of course, this isn't the Dark Ages, that was in the early Fifties, but it was a great thrill to us when one of the local television stations televised John Hopkins and Western Maryland, but it is not inconceivable that they

would pick that game up yet and have it -- maybe televise it — well, televise it — well, say, schools such as the University of Kansas, which I don't know how often the University of Kansas has appeared over recent years, they have not been a football power of the magnitude of, say, Oklahoma or Nebraska. But having lived in Kansas City — as I indicated earlier, having lived in Kansas City for a year, and my wife — I lived in Kansas City, but my wife commuted forty miles to the University of Kansas, forty some miles to get a master's degree, we have been quite interested [597] in watching the University of Kansas on Saturday, and I suspect that Kansas City — in general, people are interested the University of Kansas, even though they lived on the Missouri side, and we would like to have seen the University of Kansas, and I suspect today they would like to see the University of Kansas on football — play football on Saturdays, televised locally. The University of Kansas is just one example —

Q. Well, using that —excuse me. A. It's just one example of a — a football team that is not a power, and I suspect hasn't appeared very often on T.V., but might appear if they could sell their rights locally, same might be right of Tulsa University, for example. I don't know whether Tulsa University has appeared on television or how often in recent years. I do know I saw them beat Florida and apparently a year or two ago, and I think they are an attractive team to watch on television.

Q. Do these schools, such as Kansas and Tulsa, have enough of a popularity to justify their appearance on a national broadcast very often? A. No.

Q. Do they even have enough popularity to justify an appearance frequently around the country, of that team if the country is split up into just a few regions? A. Not — not — schools like — well, like Tulsa, [598] I can't really speak about Kansas — I would say, generally, no.

Q. So you are speaking then of the potential for local television for stations? A That's right. That's right.

Q. Now, you have indicated who some of the — some of those who have not benefited under the present plan, would you explain to the Court who you see as the beneficiaries of the plan? A. Well, N.C.A.A. certainly benefits from the plan. N.C.A.A. keeps control of the college football. They get eight percent — I believe the figure is eight percent of the — of the revenues, so that they benefit from the plan. The network that sponsors the college television football certainly benefits from the plan, and it benefits from the plan relative to the independent television networks, relative to, as we heard this morning, S.T.V. out in California, so it's the large oligopolies, the network, that benefits from the plan, the sponsors benefit from the plan; that is, the major national corporations benefit from the plan. In the absence of which local sponsorships, for example, might be available to smaller companies, regional companies, local companies, which can't afford to — to compete with — or sponsor nationally with Miller Brewing, Anheuser Busch and the likes of those companies.

[599] So that the major companies in a select number of industries benefit also from this kind of a plan.

* * *

[600] Q. Have you in the occasion or your broadcast study — study of broadcast college events, given any attention to the question of effect on attendance and televising college football games? A. In the course of my studies over the — well, the last twelve years, and particularly between 1970 and 1978, [601] when I did an awful lot of work on the subject, yes.

Q. What kind of work have you done and what have you read in that regard? A. I think that I have read virtually — prior to 1978, I would have read — expect virtually everything that was available — available to me on the impact of attendance — the impact of television on attendance in sports, generally. I have done my own work in some — some analysis

of my own with — in various ways, with particular respect to professional football, particular respect to professional — specific respect to professional baseball.

Q. Have you read — A. I have read the — in connection with this case, I was previously aware of the studies that were done from — and knew the general conclusions of the studies that were done for the N.C.A.A. back in 1949 through 1956, the Norwalk —

Q. The N.O.R.C.? A. I'm sorry, the N.O.R.C. studies, I'm certainly aware of them, it was written up in the *New York Times*, what they had to say and general conclusions, in connection with this case, I have looked into those in greater detail.

Q. And have you formed an overall conclusion then as to what those — all the studies that you have read — you say you have tried to read all of them — have been, as to what those studies demonstrate as to the relationship between [602] football television and live attendance? A. The answer is that one cannot make a generalization. I hate to be — I hate to hedge on this kind of thing, but what I believe most people discover who look into this thing carefully, is that there are some cases where live television, either of one's own games or live television of other's games, will impact adversely on attendance, either in certain professional sports or in college football.

There are other cases where it has no effect whatsoever. There are some cases where television clearly enhances attendance.

On balance, I think one cannot reach a generalization.

Q. Directing your attention specifically to the N.O.R.C. reports, would you evaluate, briefly, for the Court, what conclusions you have reached about those reports and what they did demonstrate or what they do not? A. Well, the first of

the reports, I think, reached a reasonably fair conclusion, not necessarily on the correct basis, but I think they reached a reasonably fair conclusion, namely that television might perhaps impact on attendance at football games, but that it was too early to tell. Namely, it was too early to tell because at the time that these studies were being undertaken, television was just beginning to spread and it didn't spread evenly throughout the geographic United States, and there was another—so that we couldn't really [603] determine the impact on television — of television on televised sports.

Moreover, in addition to this being a period in which television was new and it was just beginning to spread, there was a second factor that was overlooked in these reports, namely, the base years on which the reports or the years in which the report started were — the base years, I believe, were — from which all other attendance was looked at, I believe were for 1947 and 1948, but the point is that this was just after the war, and we're talking about — we're talking about entirely new climate, we're talking about just a dynamic — dynamic point in time, so that, for example, if — it's not inconceivable to me and I do not have the data available that 1947 to 1948, which were years prior to which college attendance — attendance — live attendance at football games began to fall, those years might have been exceptionally high years, for example.

We don't—we don't really know that. But those reports generally did—what they generally did was—was to look at the fact that television sales were growing, the fact that college football was at the same time beginning, and only over a couple—over about a three-year period, by the way, and then concluded from that, that television must be having an adverse impact on college football attendance.

Now, they try to do this in a slightly more sophisticated [604] way, not necessarily successfully, but this kind of conclusion, based on very small data, it's very interesting. It's—it's exactly the same kind of analysis in statistical books, when we

teach relationship, to show our students how careful we have to be in that sort of analysis. Instead of having college football attendance on the left-hand side of the column, and television sales on the right, they usually have something like—and I'm not being belligerent, I'm using the exact thing that is used—the number of—number of cases of certified insanity, and those that grow on the left-hand column at the same time that college football television grows, so the argument is made, would you conclude from that, that—I'm sorry, at the same time—sales of television sets have grown, and the question is, would you conclude from that, that the sales of television sets or that television has contributed to the rising level of insanity in the United States?

Well, I think the anwer, generally speaking, is, no, and we can recognize clearly why the answer to—we think the answer to that is no, and we can recognize why it was no, and the same thing is true of the N.O.R.C. report. We don't have enough data in there. We have to analyze those data in a very—in a very careful way.

The other thing that's true about those reports is that they were, as I indicated, related to a period immediately [605] after the First World War, they related to a period during—Second World War, related to a period also during the Korean Conflict, 1951 and '2, television was new, it was a novelty and the experience on even—even if the inferences they drew were, in fact, valid, that television in its birth did—in fact, did happen to have an adverse impact on attendance, that certainly doesn't say what the impact would be today, twenty-five—twenty-five years later, now that we are all adjusted to watching television and sports on television.

* * *

[606] Q. (Mr. Muchmore, continuing.) Does it appear to you, Doctor Horrowitz, that the N.C.A.A. television plan does have the effect of distributing the income from television on a more equal basis than it might under a free competitive market? A. I expect that it is so.

Q. If that is the case, would you take that as a pro-competitive virtue of the plan? A. No.

Q. How would you regard it? A. Well, it doesn't impact on competition, the distribution of the total pay — or of the total broadcast rights. The equity of the distribution of broadcast rights doesn't have any effect on the competition in the relevant market.

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[609] Q. Have you reviewed the new contracts for next year with the N.C.A.A. and the "Principles of Negotiation" and the ground rules, for two network schedules, to be in effect starting with 1982? A. Yes, I have.

Q. And have you analyzed with a view as to whether anything in those changes your conclusion as to the anti-competitive aspect of the plan as it now exists? A. Yes, I have.

Q. What do you conclude and why? A. As far as competition is concerned, in the relevant market there is still no competition for televised — for televised football; that is, the cartel still sells the games [610] and the games do not have competition from other televised games.

Q. What about price? A. I'm sorry, live televised games, there is no competition for live televised games.

Q. What about competition between the two networks? A. There is no price competition between the two networks. They have a very friendly arrangement with respect to how the games will be divided up between them, and the fee is the same — the fee that will be paid for the games is the same under each contract.

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[611] **JAMES E. HIBDON**

was called as a witness by the plaintiffs, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Muchmore:

Q. Would you state your name, please, Doctor Hibdon? A. James E. Hibdon.

Q. What is your profession, please? A. I'm professor of economics, University of Oklahoma.

Q. That is, of course, the University of Oklahoma which is a plaintiff in this lawsuit? A. That's correct.

Q. How long have you been at the University of Oklahoma? A. This is my twenty-first year.

Q. And how long have you been a full professor? A. Since 1967.

Q. What other colleges or universities have you been affiliated with prior to that time? A. I taught at Georgia State University for my first full-time teaching job, and then moved to Texas A & M.

Q. And in what area were you teaching in those schools? A. Economics in both cases. And specifically my area is price theory.

Q. What is your educational background, please? A. I attended both Oklahoma Baptist University and [612] Syracuse University, but my bachelor's degree is from the University of Oklahoma in political science. My master's is from Oklahoma — University of Oklahoma in economics. My doctrate in 1957 was from the University of North Carolina.

Q. You have stated that you have a specialty area of price theory. Would you say a little bit more about that as to what price theory is and what kind of application price theory has in

economics in the real world? A. All right. Price theory is sometimes called microeconomics and it's a study of how markets operate and prices as a coordinating mechanism in the economy. It considers such factors as the determinate demand for product, the characteristics of that demand, the determinates of supply and the characteristics of the supply functions, and considers how those factors are put together; that is, demand and supply operate in the market and in various kinds of markets to determine prices and output in various periods of time.

The markets considered usually are pure competition on the one hand, and at the other extreme is monopoly, and in between those two, we have two types of markets called monopolistic competition and oligopoly.

Q. In being a professor at the University of Oklahoma, do you also stay abreast of developments in the field of economics, generally? A. I try to.

[613] Q. What — have you published books or articles relating to the field of economics? A. Yes, I have one textbook, *Price and Welfare Theory*, which was published in 1969 by McGraw-Hill. I have contributed to other books and I have some articles in journals and a monograph, joint author of a monograph.

Q. And have you also been employed during the time you were at the University of Oklahoma by the United States Government? A. I had a sabbatical leave from the university and spent fourteen months as advising scholar in the Department of Commerce in 1977 and '78.

Q. What kind of research did you do there or work? A. I was in the economic development administration in the office of research of that particular branch and study there was concerned with the variations in income among various counties

and other areas, cities, even in the nation, and some of the determinants and what could be done to help what were called distressed areas.

MR. MUCHMORE: We would tender Doctor Hibdon as an expert in the area of economic theory generally, but specifically microeconomic price structure.

THE COURT: Doctor Hibdon will be so accepted by the Court by virtue of his training, education and experience.

[621] Q. All right, sir. And, now, have you determined whether the television plan and contracts would have an impact on what you described as the free market part of the state? A. Yes. I think there are some significant impacts. In the first place, the producers of games don't actually sell them. What we have is an intermediate organization, N.C.A.A. television committee, which negotiates contracts with networks; previsouly to '81, it was a recent agreement with one network, the last sixteen years, it was A.B.C. which won that right or paid for that right to televise.

The television committee of the N.C.A.A., while not a producer, then is a seller, so it acts as a central sales organization for the producers of games. I'm calling the schools the producers of games. It negotiates, as we have heard in previous testimony, some minimum aggregate fee for a package of games which they specify involved so many national and so many regional games, and that minimum aggregate fee then establishes as the minimum amount that the network must pay for that set of games.

The network at that point — up and through '81, achieved an effect, a monopoly, in the transmission of college football games because you only had one network, then, that was selling college football games over there, either nationally or regionally or in some cases seminationally.

The network then would offer — would tell the schools [622] that it chose — whose games it had chosen to televise,

that they had made such a decision and tell them what price they would pay for the television rights.

The schools would then accept that statement and the television then would proceed.

What you have there is a foreclosure of the options of the schools involved; that is, they no longer had an opportunity to sell to anybody else; they had to deal directly with a network, so that meant both is a monopsony. It's the counterpart of the monopoly, but on the other side of the market. So you had one buyer then who stated a price. The schools, on the other hand, had no options as they would have had under a free market situation, no alternatives for sale. Occasionally under the exceptional rule, they could have some local sales, but those were comparatively trivial in terms of income, as I understand it.

The result was that the colleges then were going to put on the game, so they had all the costs of that, they had the revenues from the gate sales, and the only question that arose then, should they have additional revenue from the sale of those rights? There was no cost, the marginal cost of the rights was zero to the school. So what we find then is that schools who were the sellers of these T.V. rights were placed in the position, since there were no options, in a perfect elasticity of supply of goods, it was a perishable good, they [623] could take it or leave it since they didn't have options, and for that reason, then, they didn't have any bargaining precedence, any ability to bargain, because of the foreclosure of options.

We see to that, of course, under this arrangement, the number of games that would be televised was specified and that of course, fixes the number of games that would appear on television.

Q. What is — how do the economists refer to that, the number of games and quality of games that are put out? A. Well, that's restriction of output and, of course, the general

arrangement that I see there is if we have a cartel in operation, which you have a central selling agency operating to represent a group of producers.

Q. And do you find the price dispersion that you predicted in the open market? A. No, there was no price dispersion. You had a different level of prices for national games and for regional games in any one year, but they were constant. They did not reflect faulty variations in the games as you would normally expect. For example, I looked at the ratings that the N.C.A.A. prepared and saw that the ratings varied from, I believe it was seven point seven, to eighteen point four, so that the ratings of the highest game was about two-and-a-half times as much as the lowest there, and presumably that much more [624] valuable to the stations and to the advertisers. If you will look at only the big games, the survey showed that the ratings varied from ten point two, I think it was, to fifteen point nine, so about fifty percent more for the highest game.

Now, you would expect then enterprises to reflect some variation in quality or anticipated equality of the game, but, in fact, they did not.

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[625] Q. Well, what do you conclude as to whether output has been restricted as to the premarket condition? A. Oh, it definitely has been restricted.

Q. And what effect does that have on the consumer? A. The effect on the consumer is, of course, to narrow his choice, and while that may be of benefit to the producers, it is not a benefit to the consumer. The options are made [626] and the games that they may prefer to watch are not shown because of that restriction on the number of games that can be shown.

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[628] Q. Doctor Hibdon, finally, there has been testimony as to the potential for success and the success of the N.C.A.A. as a

cartel, compared to other cartels. Do you have your own thoughts on where the N.C.A.A. stands in that respect? A. Yes. The history of cartel shows that they tend to break ground after a while because there is always somebody in the group that wants to cheat, and sell at more than they are supposed to, or to produce more, or both, and so one of the problems of the cartel is how to police the arrangement to see who is doing this sort of thing and levy some sort of penalty, so it is a policing and preventive arrangement.

One of the more effective ways to have a cartel is to have a central selling agency so that no one can sell outside of that central sales agency, and that's what we have here.

But they can derive the Saturdays and Sundays among cartel members on how the money — how the games are distributed among the participants in the cartel, and that begins to be partly a political and partly an economic question, and if [629] a cartel is going to survive, then it has to determine who are members of the cartel to keep the thing from decreasing.

It appears to me that the N.C.A.A. has had to remember — had to revise the provisions in the contracts going to networks, contracts are a reflection of that fact; that they are trying to keep more people in the cartel.

Certainly getting some of the — N.C.A.A. will not get some, so they will be placeted. On the other — this is evidence, I think, of the fact that they haven't been totally successful in that, and I would, in fact, like to break away from it, and they are trying to prevent that.

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[645] **JAMES FRANK**

was called as a witness by the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Harry:

Q. Would you please state your name and address, sir? A. James Frank, 601 Jackson Street, Jefferson City, Missouri.

Q. And what is your occupation? A. I am president of Lincoln University in Jefferson City, Missouri.

Q. And can you tell the Court briefly about what Lincoln University is? A. Lincoln University is a state-supported institution in the State of Missouri; been in existence since about 1866, and it is a part of the statewide system of higher education in that state.

Q. Now, do you occupy a position in the N.C.A.A., as well as being president of Lincoln University? A. Yes. I am the president of the National Collegiate Athletic Association.

Q. And how long have you held that position? A. Oh, since January of 1981.

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[648] Q. Now, Doctor Frank, in addition to serving there as president, you said you had served in the N.C.A.A. When — what was the first type of service other than being a member, [649] as your have said, in division two? A. Yes. I think the first committee that I served on within the N.C.A.A. was on the long-range planning committee of the National Collegiate Athletic Association, and that was before 1974. I am not sure of the exact date that I accepted that appointment.

Q. Before what date, sir? A. It was 1974, but I am not sure of the exact date.

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Q. And how long did you serve on that? A. I served on that, I think, approximately two years, until I was appointed to the N.C.A.A. council, elected to the N.C.A.A. council.

Q. Would you tell the Court what the council — what the council function is? A. Well, the council is the body that acts in between [650] the conventions. The ultimate authority within N.C.A.A. is the membership, and the council is authorized to take actions on behalf of the N.C.A.A. when the convention, of course, is not in session, and that amounts to about four times a year.

Q. What is the convention procedure, Doctor, the annual convention? A. Well, the convention is held, of course, once a year, and that is the time when members and the council will submit legislation to the entire membership; delegates, representatives from all of the member institutions will come to the annual convention and vote on the proposals and legislation that is before the annual convention.

Q. Now, that's always in January? A. Yes, it is.

Q. And does each member have one vote? A. That's true, yes.

Q. Now, who elects the council? A. The council is elected by the total membership.

Q. And what was the year in which the membership elected you to council? A. Nineteen seventy-five.

Q. And how long did you serve on it? A. Well, I have been serving continuously since 1975, as a council member, as secretary-treasurer of the association, [651] and now as president. And as secretary-treasurer or president, you are a member of the council.

Q. So those weren't at the same time. You successively held the office of secretary-treasurer, and then became president? A. That's true.

Q. How many members on the council? A. Oh, twenty-two, including the secretary-treasurer and the president. I believe that's the figure.

Q. Now, Doctor Frank, during this period of time that you have been on the council and held these offices, has there been an activity in the N.C.A.A. to restructure the membership, or deal with the relationships among the members? A. Yes. This is an issue that has been under continuous discussion for many years. I think ever since I have been on the council, going back to 1975, and, of course, I remember specifically the proposals that were before the convention in 1978, and that was a very specific, meaningful proposal. However, it was defeated at that time.

[653] Q. Well, I think it might be well to come right on through on that, Doctor Frank. Tell me, if you know, was there a special convention then held in Saint Louis on December 3rd and 4th, 1981? A. Yes. And before I get to the special convention, I would like to indicate how the proposals came forth for the restructuring of division one A.

Q. Please do. A. In December of 1979, it might have been November of 1979, the council gave a great deal of thought and discussion to the entire reorganization of the N.C.A.A., not just with the restructuring of division one A. And so the council appointed a special committee on governance, organization, and services, to deal with not only the restructuring, but to look at the entire organization of N.C.A.A., how to accommodate the interests of women within the N.C.A.A., and certainly to see what we would do about restructuring of division one A football.

Of course, at that time, our attention was devoted almost entirely to the women's issue, but after the 1981 convention, then the council turned its attention to the restructuring of division one A. A subcommittee was appointed in order to

[654] deal with it, because we felt that our government would be rather cumbersome for the entire governance committee to deal with this important issue.

Q. What is the governance committee? A. The governance committee is the committee appointed by the council to look at the entire structure of the N.C.A.A., to examine its legislative processes; as I stated before, to see how women could be accommodated within the N.C.A.A., to look at a restructuring of division — the division, as well as to look at the district representation within the N.C.A.A.

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Q. Now, what did it do? What did it accomplish in this area? A. First of all, it did accomplish the goal of accommodating the interests of women within the N.C.A.A. [655] We looked at the district structure and made some changes there, but more importantly, it made recommendations to the full governance committee, as well as to the N.C.A.A. council, for the restructuring of division one A, which resulted in the calling of the special convention in December of 1981, and —

Q. We have been telling the Court a lot about restructuring, Doctor Frank. Does that simply mean changing the number of members, the qualifications, so that the number will change? Or is there more to it? A. No, I look upon restructuring as a much larger issue. But to be quite candid, the central, the overriding concern of a large segment of the N.C.A.A. was the reduction of the number of schools in division one A.

Q. What was the number before the 1981 convention? A. I believe approximately one hundred and thirty-nine members, and that has been reduced.

Q. And what is the number now? A. I quess between ninety to ninety-five, I'm not — maybe about ninety-two. I am not sure of the exact number.

Q. You said in your view, restructuring was a broader concept than the narrow one I have given you? A. Yes, broader in the sense that to include women within the N.C.A.A. as a part of our restructuring, to change the structure of the council, to do something about the [656] executive committee. I think all of this involves an examination of the entire N.C.A.A. structure, and so it's broader in the sense that we did more than just reduce the number of schools in division one A.

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[660] Q. Now, Doctor Frank, in exhibit D-two, would you state for the Court any other action taken? And you can look through and see, in regard to restructuring, in the broader sense that you have referred to? A. I do — without refinding it, resolution — let me see if this is it — yes.

I think resolution number ten, which is on page A dash nine, is a resolution offered by the council dealing with football television, and essentially that empowered the council to offer legislation at the January convention to reorganize and to make some changes in the football — television football program of the N.C.A.A.

Q. And what, generally, did it do? A. It empowered the council to approve specific legislation which was offered to the annual convention and voted upon.

Q. What year? A. January of '82.

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[662] Q. And are the three resolutions, forty-five, forty-six, and forty-seven, under that subject? A. Yes.

Q. And essentially, what did they do? A. Well, the first resolution, number forty-five, because [663] of the many questions about the official interpretation of the N.C.A.A. —

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A. And this resolution provided for review and approval of the N.C.A.A.'s council April 17th, 1981, interpretation regarding the association's control of all forms of televising of intercollegiate football games of member institutions during the traditional fall season.

I am reading from the intent.

A bit of background: that was an interpretation which was distributed by the council, and the council felt that this should be put before the entire membership for them to approve or to disapprove, the official interpretation of the council. And the members voted upon it and overwhelmingly passed it.

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[668] Q. Doctor Frank, in order to identify that, I want to show you exhibit eighty-four, which is in evidence. And it's a letter from Mr. Hallock to you, I believe, of April 17th, 1981, requesting authority to disseminate a set of principles to the membership for a referendum vote. And I believe it contains the principles.

Would you look at exhibit eighty-four, please, and advise the Court what that is? A. This is a letter to me from the chairman of the [669] football television committee, Mr. Wiles Hallock, requesting from the council authority to conduct a mail referendum.

Q. Very well. Does it contain in it the principles as the television committee recommended them to you? A. Yes, it does.

Q. And there are fourteen, are there not? A. I believe so.

Q. And they deal with matters like the number of appearances per team in a certain period of time, and the two-network concept, and the term of the contracts, and all that, don't they? A. That's true.

Q. Now, is that set of principles acted on by anyone before it is submitted to the membership for vote? Does the council consider it? A. Yes, they do, yes.

Q. And did they in this case? A. Yes.

Q. And then what was the result of the referendum mail vote by the members? A. Again, the membership overwhelmingly approved the principles submitted to them.

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[670] Q. Now, Doctor, at the time that the council approved the referendum in April, 1981, were you advised of activities by the College Football Association in connection with the upcoming T.V. plan and television contract? [671] A. Yes. The council is aware of activities by the College Football Association.

Q. And how did you learn of it, and what did you learn? A. My recollection is that I know, or at least was brought to my attention, was, I believe, a letter, or a memorandum from the College Football Association to its members, asking them to abstain from — from voting on the principles which had been — which were — subsequently would have been submitted to the N.C.A.A. membership for a vote.

Q. And is that the first thing you learned about the C.F.A. not being in accord with these principles? A. I believe so, except for informal conversations with members of the N.C.A.A., as well as the C.F.A., indicating there may be displeasure about the whole television plan of the N.C.A.A.

Q. Now, did there come a time, then, when the council adopted an official position on that? A. Yes.

Q. And was that precipitated by the act of the C.F.A. in abstaining? A. Yes, it was.

Q. Tell the Court about that. A. Because of the request by the C.F.A. to its members the council felt it necessary to

issue an official [672] interpretation regarding football matters, and certainly to indicate to the membership, or educate the membership what an abstention meant on the television football principles. And that, in essence, was the reason for the official interpretation of the N.C.A.A. council.

Q. And would you look at exhibit two, which is in evidence, Doctor Frank, and state whether that is a copy of the official interpretation? A. Yes, this is the official interpretation.

Q. What dissemination of that was made, sir? A. To the entire membership of the N.C.A.A.

Q. Doctor, did there then develop a running controversy over this matter of the principles and how the contract for the upcoming television, beginning in 1982, would be handled? A. I would say "yes," controversy did develop.

Q. And it's led us to here, has it not? A. That's true.

Q. Now, just outline for the Court, if you will, the highlights of the events as you were involved in them? A. Well, not to duplicate, but I just mentioned how the official interpretation, you know, came about, and I am not sure of the exact dates, but I do know that when the announcement that the College Football Association was going to sign a contract with—with N.B.C., it certainly caused some concern with them, within N.C.A.A. circles.

[673] I believe that first I knew about it, or heard about it, the N.C.A.A. council was meeting out in Oregon, which would have been August, you know, of last year. And as a result of this action by the C.F.A., then the C.F.A. — the membership had to talk about the official interpretation, and I guess a lot of letters started to be written to distribute to the membership of both organizations regarding T.V. matters.

Q. Did you learn in the early part of 1981, that C.F.A. had its annual meeting and rejected your official interpretation and decided they would proceed on their own? A. I did learn about that.

Q. Now, was one of those letters — let me hand you exhibit seventy-one, dated June 23rd, 1981, and ask you if that's one of the letters that you have referred to? A. Yes, it is.

Q. And just tell the Court the occasion and purpose of that letter? A. Yes. The — this was a letter that was sent out over my signature, and it explained essentially the position of the N.C.A.A. regarding the stated intent of the C.F.A. to sign a contract with N.B.C.

It also reaffirmed the official interpretation that had been issued by the N.C.A.A. council back in April.

Q. It was a summary of your position and the council's? A. Yes.

[674] Q. And it went to all the chief executive officers of N.C.A.A.? A. Yes, that's true.

Q. I take it you didn't attend any actual C.F.A. meetings or have any specific dealings with C.F.A. personnel, yourself? A. No, no meetings. Of course, I talked to C.F.A. personnel, chief executive officers.

Q. When did you do that? A. Throughout the summer, quite a few.

Q. You had been getting calls from them? A. Yes. And there were many, many discussions, mostly by telephone. And, of course, there are C.F.A. members that are members of the N.C.A.A. council, and the governance committee, so I had occasion to — I think the steering committee met last June and had discussions with C.F.A. members at that time.

The council met last August, and C.F.A. members on the executive committee, as well as on the council. We had these kinds of discussions.

Q. So in the occasion of your regular N.C.A.A. business, you came in direct contact with the C.F.A. representatives, and naturally these matters were evolved? A. That's true.

Q. What essentially was said between you? [675] A. Well, it's back in June, again, when the steering committee met, and we considered the official interpretation. There was give and take on both sides. I would say that members of the C.F.A. expressed a point of view, other members, you know, had their version or had points of view. It was this kind of discussion. And, obviously, we were talking about the official position of the C.F.A. versus the N.C.A.A.'s position, and it all evolved around two issues, reorganization and television matters.

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[679] Now, Doctor Frank, at any time during this period we [680] are talking about, let's say from August up through the — say earlier, in June of '81, through the special convention in December, did you threaten or coerce any of the C.F.A. members? A. Absolutely not. Under no circumstances would I do that.

Q. Do you know of anyone else at N.C.A.A. who did so? A. No, I don't.

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[681] Q. Did you state to C.F.A. members in these discussions in the summer what the consequences of their going forward with the C.F.A. contract with N.B.C. would be? A. You know, questions were asked, if they signed a contract with N.B.C., what would be the consequences, what position would N.C.A.A. take.

And my, you know, response generally was that it appears to be in violation of the legislation of the association, and any member that is in violation of the legislation is subject to the enforcement proceedings of the N.C.A.A.

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[682] Q. How has the football television plan tied into the educational objectives of N.C.A.A.? A. Well, I go back to what I know about the history [683] of the N.C.A.A.'s involvement and control of the televising of football. And it was started because the membership felt that it was necessary to exercise control over the televising of football.

Essentially, the television plan that has been approved by the N.C.A.A. serves a number of purposes.

Number one, I believe it serves to educate the general public about the place of college football within the total educational enterprise.

I think, secondly, the N.C.A.A. has attempted to spread the benefits of college football — that is, television — to as many members as is practicable.

Thirdly, I believe that it has served to project a very favorable image of college football throughout the nation.

And I believe those are some of the — those have been the objectives, and I believe they have been accomplished as a result of the N.C.A.A.'s involvement in the control of college football, televising college football.

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[684] Q. Now, are the members of the council separate from the staff? A. Yes, they are.

Q. Now, where do the council members come from? A. Well, the council members are elected by the membership of the association, and based upon the—based upon the division representation, geographical representation, they come from all over the United States.

Q. But are they — who are they? A. They are—the council consists of members — the representatives from the member institutions. And to [685] be a council member, you have to be the president or chief executive officer, or you have to be the faculty representative, usually elected by the faculty

members at the institution, and athletic director from a member nstitution or the feed mill, who is in charge of the womens program or has a major administrative responsibility within intercollegiate athletic programs.

So all the council members are from the member institutions.

Q. Are they paid anything for their service? A. No, they are not.

Q. You have not been compensated during the time of your service over these several years? A. No.

Q. What is the relationship in connection with policy between the council and the staff? A. Well, the council's responsibility is to establish and to formulate policy. And the staff's responsibility is to carry out the policies of the N.C.A.A. council.

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[686] *Cross Examination by Mr. Muchmore:*

Q. You had occasion, then, Doctor Frank, to speak with a number of the schools, the heads of the schools who were contemplating whether or not to join in the N.B.C. contract during the time they were making the decision? A. Yes, I did.

Q. And in the course of that, there was a discussion with them as to whether they would be in violation of N.C.A.A. regulations or rules, is that correct? A. That would be a part of the discussion that I had with the chief executive officers.

Q. And you would inform them that, in your opinion, if they went along with that contract, they would, in fact, be in violation? A. At one time I did, yes.

Q. And you also informed them that if they were to go along with a contract with another network, then you would anticipate that an official inquiry would be made and enforcement procedures would begin? A. I have indicated that, yes.

Q. Did you indicate to them what the results of the enforcement procedures might be? A. No, I did not.

[687] Q. Were you aware at that time that there were articles appearing in the newspaper, which N.C.A.A. officials were being quoted as saying that these sanctions could go so far as expulsion from the N.C.A.A? A. I read some articles like that. I don't recall any N.C.A.A. official saying it. I certainly did not indicate to anybody what the results would be, because I would not know.

Q. But my question was that the results could be up to expulsion, and that's a true statement, is it not? A. I believe so, yes.

Q. And it is true that right about this same time, you were meeting on the council, and you were deciding that such investigation should proceed promptly if you determined that these violations were apparent? A. Well, there was discussion on the council as to when investigation or inquiry would begin. I do remember specifically a discussion as to whether or not a violation occurred when a school gave an intention of signing with N.B.C., or whether it would begin when the school actually signed with — not signed with N.B.C., but contracted for a game with N.B.C.

So those are the kinds of discussions that took place, and certainly at that time, members said that whenever this determination was made, official inquiry could be made, and [638] that is the beginning of the enforcement procedures.

Q. Yes, sir. My question is, do you not, on the council, decide that — when you determined that the violation had occurred, that the proceedings should begin promptly? A. I am not sure that was an official action of the council.

Q. My question was, was it not discussed on the council, that should take place? A. It was discussed on the council, yes, sir.

Q. Now, what exactly was it that you were informing these N.C.A.A. members that they would be in violation of? A. They would be in violation of the N.C.A.A. legislation.

Q. All right. Which legislation were you informing — A. In this case, it would be the principles which had been voted upon by the membership.

Q. Are you referring — A. And —

Q. Go ahead. A. That's all, I am finished.

Q. When you say the "principles," are you referring to the principles of negotiation which were submitted, and which were made an exhibit here and referred to a little earlier, from the television committee? A. Yes, I am.

[689] Q. And that the membership approved? A. Yes, I am.

Q. And it is your position that these principles of negotiation constitute legislation, the violation of which would subject a member of the N.C.A.A. to enforcement proceedings with sanctions which could result with anything up to expulsion from the N.C.A.A.? A. Yes. The principles come under the category of "other legislation," which is referred to — not sure, in the bylaws or in the constitution.

* * *

Q. All right. The reference was made consistently, was it not, to article four, section two-A of the constitution? A. Yes, conditions and obligations of membership.

Q. And when these members were informed that they would be in violation, the reference was made to four, two-A, was it not? A. That's right.

Q. And that reads, "Conditions and obligations of [690] membership. The members of this association agree to administer their athletic programs in accordance with the constitution, the bylaws, and other regulations of this association."

And it is your understanding that the term, "other legislation of the association" was — meant the principles of negotiation that have been introduced into evidence here? A. That's true, yes.

* * *

[691] Q. And you are referring to your letter to the chief executive officers on the behalf of the council, dated June 23rd, 1981? A. Yes, I am. Again, I would like to see it again, but right now, that's my reaction, that that would answer your question in terms of "other legislation."

And also the official interpretation of the council.

* * *

[694] Q. The problem is, or the perceived problem is that if we have too many games on television, that that's going to be a problem for live attendance, is that right? A. It's when those games are televised that it would be a problem for live attendance.

Q. Now, that problem can be avoided, if that problem exists, by any rule that limits the amount of live television in the manner that the N.C.A.A. thinks it ought to be limited, right? A. A rule would be necessary in order to limit the number of games, yes.

Q. But wouldn't a rule which provided the number of times you shall be on television, is limited, but you can sell your rights to be on television that number of times, to whomever you want, for whatever price you want; wouldn't that accomplish the same result? A. I don't think so. I don't think just having a rule limiting the number of games on T.V. would accomplish the same result.

I believe that it's absolutely necessary for an association to be able to exercise some control. I think there must be some

enforcement procedures, simply because if you just had the rule, alone, then I think you would have quite a few abuses, and you would have to have some kind of control.

In answer to the — maybe the first part of your question, [695] it doesn't necessarily have to be the N.C.A.A., but I believe there has got to be some organization in order to do this.

Q. There's got to be some organization telling the school how often they can be on T.V., or do you mean there has to be some organization which sells their rights for them? A. Well, both, really.

Q. I want to know why it is not sufficient to have an organization such as the N.C.A.A. telling them how often they can be on television? You can be on television exactly the number of times provided under last year's plan, except that this year you can sell your own rights. Why isn't that sufficient?

Why wouldn't that be sufficient to protect live attendance?

A. Well, I just stated, and you are just confining it to the number of appearances, but I think the television plan certainly is more complex, involves more than just the number of times that a school can appear on television. And I think as a result of that, it is very important that there again be some association or some group or some body that would be necessary in order to monitor, as we do now, all of the matters that go into teams appearing on television.

Q. I am not sure that I understand what you mean by "monitor all the matters that go into the teams being on television." [696] A. Well, I do know that we have members of the television committee that are in constant contact with the network to make sure there is compliance with all — you know, the stipulations in the contract.

I know there are many things that go into making up the contract with the network, and I think they are on the phone constantly. They are having conference calls and so forth.

The point I am making here is that it is more than just a matter of having a rule limiting the number of times a school can appear on television. It is just more complex than that.

Q. It is also a matter of enforcing that rule? A. If there are violations, yes.

Q. And your concern is that that rule cannot be enforced unless it is the N.C.A.A. that is making the sales of the contract? A. Well, I said it does not necessarily have to be the N.C.A.A. It could be some other organization, but as long as you are a member of the N.C.A.A. and this organization has certain rules and regulations governing the televising of football games, then a school is obligated to comply and to abide by those regulations.

Q. What I am asking, are you saying that if you allow the school to sell their own rights, but tell them how many times [697] they can be on T.V., and when, if you like, that that's not enforceable? A. I don't understand that question.

Q. Is the point you are making that if you let these schools sell their own rights, their own price, that we can't enforce that? Is that the point you are making? A. Well, you are talking about the awarding of rights, and it is my understanding that the schools, right now — no, not my understanding — I know that they can negotiate their own price with the network. The only thing that the N.C.A.A. is doing, of course, is agreeing on the minimum aggregate price with the network, and the school is free to negotiate with the networks for the games that are going to be televised.

Q. What if we tell the school, "Here's 'X' number of times you can be on television." A. Yes.

Q. "And here's when you can be on, whichever network you like."

Why wouldn't that protect gate attendance? A. Counselor, I think I have already answered that, and I would just only be repeating myself.

Q. I don't want — A. And saying the same thing.

Q. I don't want to ask you to repeat yourself. [698] All right, sir.

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[715] **WALTER BYERS**

was called as witness by the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Harry:

Q. Mr. Byers, would you please state your name and address? A. Walter Byers, 8424 Fontana, Prairie View, Kansas.

Q. What is your occupation? A. Executive director of the N.C.A.A.

[716] Q. How long have you been executive director of the N.C.A.A.? A. Approximately thirty years.

Q. And were you the first executive director or did you succeed someone else? A. No, I was first executive director.

* * *

[720] Q. So from the beginning, was N.C.A.A.'s original and first action in the area of regulation and control? A. Yes, it was and particular pointed toward football.

Q. Now, could you describe for the Court, then, the evolution of the N.C.A.A. rules? A. Well, as I mentioned a moment ago, after World War II, several things had taken place which moved intercollegiate competition from essentially a regional activity to a national activity. I think probably the first that occurred before the war were the national radio broadcasts by a number of outstanding commentators of intercollegiate football games that spread the reputation of different institutions across the country for the first time.

But shortly after World War II, of course, came the advent of television in the early — well, late 1940's and early Fifties and, of course, the course of the airplane became perfected and we moved from the DC-3's that were eventually regional in their capacity, to the jet props and the jet airplanes that shrunk the continent, as far as recruiting athletes was concerned, it was one of the most significant developments, along with the television for recruitment of athletes that ever occurred in intercollegiates, because it made possible [721] institutions with great projects, athletically speaking, to recruit nationally and could get a prospect to come visit their campus in a couple of three hours and get him back home for Christmas, and those types of things.

So once the — once the air service became perfected and the national radio and national television broadcasting spread the representation of colleges athletically to all corners of the country, we had national problems, we had national recruiting problems that had never really come into focus before, and we had other competitive factors in excessive scheduling and matters of that area.

So it was in the early 1950's that the N.C.A.A. first began legislating what I would call in-season type of rules.

An example, I believe, in 1951, the — we restricted spring practice so that you didn't spend too many days in spring football practice, and within a year or so, they limited the number of football games that a college could play. The first limit, I think, came in 1952 or '53, and limited ten games of intercollegiate football scheduling, and subsequently it's been raised to eleven. They limited them shortly thereafter, almost simultaneously, the number of preseason days that you could spend in practice, so that they didn't bring the students back too early from their summer jobs and didn't start them practicing too early in the fall and too far ahead of the start of classes.

[722] I guess my central point is that because the faculties that I have spoken to, the N.C.A.A. then emerged into a body to

which the colleges turned as they encountered these problems and legislated nationally in areas that caused the colleges concern.

I just say one other thing, if I may, sir, and that is that the history of the N.C.A.A. will show that most of its legislation has been brought about by the — by the sport of football. Secondly, it would be basketball. I would like to speak just for a brief second — brief minute, if I may, on why that's so.

Intercollegiate football is essentially a game of participants, it involves a great deal of athletes, it involves, of all sports, the greatest number of participants in college, and it arouses a spirit among alumni and followers that generate high enthusiasm like no other college sport we have, and with that enthusiasm comes the intensity of competition and intensity to win, and I'm sure you are familiar, sir, with the rivalries in your state and interstate rivalries that almost border on border warfare when Oklahoma plays Texas. It's those kind of rivalries that generate the enthusiasm which tends to lead to abuses which causes the enactment of many of the rules that we have.

Q. Now, Mr. Byers, could you put that in perspective and tell the Court how many sports does the N.C.A.A. act in, [723] approximately? A. I believe we involve ourselves in approximately twenty sports.

Q. And does that include both rules and championships? A. Yes, sir — well, one or the other or both.

Q. Now, you have been here throughout the trial, have you not? A. Yes, sir.

Q. From the beginning? A. Yes, sir.

Q. And you have heard the testimony about the analogy between the football television and basketball nontelevision by the N.C.A.A. Would you explain the reasons for that? A. Well, it's like when you try to compare and infer that the

policies applying to basketball should be the same as those applying to football or vice versa, it's somewhat like — well, it's like trying to compare the highly televised proportion ought to be the same as a soccer match in Yankee Stadium, jai alai in Miami ought to be the same.

There is no similarity because — except they are sports. Football television, you were speaking to the rules applying to television?

Q. I was. A. The need for football television was brought to the front because, I think, of three essential factors. One, [724] there was evidence then and there is evidence now that unrestricted television of football adversely affects in-stadium attendance. There was then and there is now the concern that if — unless college football is limited and controlled, there is going to be a very narrow T.V. aristocracy that will dominate not only television, but resources of recruiting that you get with television will dominate the sport, itself, and it was necessary to spread this remarkable medium and reward — among as broad a base of institutions as we can, and thirdly, not only to exposure and recruiting advantages of the institutions again, but there is need to spread financial resources, but at the same time give the public a good football game to watch.

You find no similarities for that need in basketball for a number of reasons.

Basketball generally and there are a few exceptions, will be playing in field houses of fifteen thousand or under, football stadiums, when you talk about one-A your're talking about football stadiums running twenty-five thousand up to over a hundred thousand at the University of Michigan. You're talking about a field house in basketball in which the spectators are almost a part of the game, they are close, they are near the floor, they can participate in it and almost every seat is an excellent seat, and the larger stadium in football you will say that probably thirty to forty percent of the seats [725] in most

of the stadiums in the country will be behind the goal lines, so you have marginal seats that you have to sell in football which is not the same that you have to do in basketball.

In basketball, your student bodies — at the University of Illinois, the students have to rotate in going to the game. They get a chance to go to every fourth game because the student body is so large, if they all went to the same game, there wouldn't be any tickets to sell to the normal spectator, so you have those kind of considerations, but I think on top of all of that, you have to realize that ninety-five — over ninety-five percent of college football is played on Saturday because of the nature of the game, because of the amount of number of students it involved in following the teams, games are scheduled ninety-five percent on Saturday. That's when all the college football television is concentrated, so in controlling football, you are televising against the mass of your institutions.

In basketball, most all the basketball television occurs on Sunday afternoons and Saturday afternoons where hardly any colleges play basketball. The teams that are being televised, of course, play basketball. But most all of the basketball scheduling is done on Friday night, Saturday night, Tuesday night, Monday night, so even though there is extensive college football televised, most of the national televising, the network televising, is done on — on afternoons when there is [726] very little conflict with the games.

So I just say, sir, that for all those reasons, I see no comparability at all to try to equate the unrestricted televising of basketball, to some type of argument that there shouldn't be television controls in football, because I just don't think the situations are at all comparable, and I suppose the overriding evidence of that is that the membership of the N.C.A.A. have never proposed that we should have controls in basketball, but we don't institute controls by some bureaucratic decision. The membership has to enact these things, and if they don't feel they are needed, they don't enact them.

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[740] Q. Mr. Byers, you also heard testimony in this courtroom about whether members of the N.C.A.A. could effectively withdraw and have their own association, have you not? A. Yes, sir.

Q. Would you state in your judgment, based on your experience, whether that's a feasible thing to do? A. For one institution?

Q. Take it that way, first. A. One institution would have difficulty in withdrawing and functioning in the sports of football and basketball. I [741] happen to think it could conduct quite a viable program in other sports, but one institution, unless it's persuaded its conference members and others combine, it would have difficulty in conducting what you might construe to be a major football goal.

Q. Is there a viable level at which you think a group of members could withdraw? A. Yes, I think — I think ten members, if they were the prominent members, could easily function and pursue a highly successful football and basketball operation. I think twenty properly distributed, east and west, could be able to function highly effectively and realize substantial financial rewards in both sports.

Q. You think the members of the C.F.A. are a coherent and viable group in that regard? A. The sixty-one members of the C.F.A.?

Q. Yes. A. Yes, they could obviously function, if they choose to do that.

Q. There is some evidence, Mr. Byers, as exhibit GP, an outline that Mr. Neinas testified was drawn up by him in November of 1981, for a university sports association. Is that the type of thing that a person would do if he were setting up an organization parallel to the N.C.A.A.? A. Well, it's obviously a proposed structure for a [742] national organization to

administer sports and enforce the rules, conduct championship competition, so I assume it's a draft program for such an organization to function within itself.

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[763] Q. Mr. Byers, we were about to turn to the origin, history, and purpose of the N.C.A.A. television plan.

Had there been — you came in 1958, as executive director, is that correct? A. Nineteen fifty-one.

Q. Nineteen fifty-one? A. On a full-time basis, yes, sir.

Q. And in 1951, did you learn there had been some action in this regard to football television before your arrival? A. Let me explain. I have been part-time assistant in the N.C.A.A. office from 1948, I believe, to 1951, and then became full-time executive director in 1951.

Q. So to whom did you report to in that earlier period? A. Well, Kenneth "Tug" Wilson, who is commissioner of the Big Ten Conference, was also secretary-treasurer of the N.C.A.A. on — that was a part-time position, too, as far as the N.C.A.A. was concerned. And I worked for Mr. Wilson, as far as the N.C.A.A. structure was concerned.

Q. So were you familiar with some activities of N.C.A.A. in regard to college football television before you became executive director? A. Yes, sir.

[764] Q. And what was the status — what happened? A. Well, television had just begun to flower in the east, and some educational institutions in the east, primarily Pennsylvania, were beginning to televise their games. This was totally new. And Dumont network out of Philadelphia, not a network as we know it now, but Dumont was doing those games, and there was some consternation expressed among other colleges in the area about this new development.

So the eastern institutions urged that the N.C.A.A. begin some kind of study, and there were discussions from, oh, '47 up through '50, at our annual conventions, about the need — about this growing phenomenon and the fact that the colleges, as far as athletics were concerned, were going to have to learn to live with this, because it had an impact, obviously a substantial future impact.

So after those several years of discussion, and at the 1950 convention — no, 1951, a resolution was adopted to declare a moratorium on any television. And we ran an experimental program, it's my memory, in 1951.

And in the interim, we had a television committee appointed, Your Honor, and they were functioning during these discussion periods, those discussion years.

But the committee had gotten authority, also, to hire a well-known, reputable research outfit from the University of Chicago, known as the "National Opinion Research Center," [765] I believe it is, N.O.R.C.

So to go back, the convention voted a moratorium on any football television, and set up an experimental program so that some games weren't televised and had no television competition in the area; other games were subject to television on a nearby game. There was cross-regionalization games.

In any event, a research pattern was set up to enable N.O.R.C. to measure the effects of television upon gate attendance, in-person attendance.

I believe — and I want to check a note on that — just a point of reference — in 1951, there were ten million five hundred thousand television households. And that compares, for example today, I think, in January of this year, there's something like eighty-three million one hundred thousand television households. I just draw that comparison to see the

type of emerging industry we were looking at, and the number of T.V. households that were being measured as to effect of attendance.

After that study — N.O.R.C., incidentally, was employed, I believe, for six or seven years, to continue to monitor this growth of television and the effect of the N.C.A.A. television policies.

So after the 1951 experimental year, and I think I have that year correct, in 1952, the convention was faced with a decision of whether to vote to control football television [766] based on the evidence at hand at that time. The convention did vote to control television, and the first few plans were quite restrictive because, obviously, the membership was feeling its way as to how do you use television as it develops to promote sports; but at the same time use it wisely so it doesn't hurt in-person attendance?

The first plan, as I recall, permitted only one appearance by a team, a year. And I believe provided for only twelve telecasts. I think you could only have one game televised a week nationally, each of twelve Saturdays, and only one team could appear one time per year.

As we evolved through the years, those plans have generally been loosened. By that, I mean — let me make this comment first. The attendance — football suddenly started to decline with the emergence of television, which led to the concern that I spoke about, and decision to control it.

But as they put in the control program, that attendance dip turned back upwards. Through the years, as the plans have evolved, the committees have recommended, and the membership has approved, more liberal plans. They loosened up the team appearance rules so you could have more than one appearance per year, and loosened up the number of games televised. Instead of just twelve single games, one each Saturday, we went into a national regional combination. And [767]

it's interesting that the pattern of national regional first emerged in the mid Fifties or late Fifties, I am not precise on this, as a best way of approaching this. And we have used that format ever since.

And I know, Your Honor, you are familiar now with the two-network concept, and the different national-regional patterns with that, and the agreement games provided now through this contract and supplementary series.

But I guess the central point I am trying to emphasize is that this has been an emerging plan, carefully studied and liberalized to provide more television, as long as our attendance keeps going up. That has been our chart. If we can live with continued growth and attendance at college football, and still maximize appearances and get the revenue there to help the sports program, that's the best way to handle this problem. And it's been very successful.

Of course, one of the fascinating questions—I may be out of order by saying remarks too far —

Q. Let me ask you a question, Mr. Byers. What is the importance of the gate attendance in this business? A. Well, gate attendance is fundamental to the financing of the program. If you — well, that speaks for itself, I assume.

Q. I think you better elaborate for the record, so we all understand it. A. [768] Well, gate attendance is obviously the foundation of financing programs. It has been the historical base on which you finance a program, in part or in whole. You obviously want to generate as many dollars at the gate to cut any subsidy that you have to devote to athletics from other educational funds. I mean, the more money you can generate at the gate on behalf of athletics, the less money you have to draw from the other budgets or state legislature to balance the athletic books.

And traditionally, the gate attendance has been the foundation of athletics.

Another factor when you measure this, maybe you like to stage fights out of Caesar's Palace out of Las Vegas, which are strictly television shows. But the romance of college football is the crowded stadium, the cheerleaders, students, and everybody being enthusiastic about a game. And we certainly don't want to end up with a studio sport for college football, because that's the heartbeat of what we have that makes this whole thing so exciting.

Q. So is it normal, and has it been throughout, for colleges and universities to sell tickets to generate sufficient revenue to be an important way of financing their athletic program? A. Certainly.

Q. Now, would you tell — [769] A. Mr. Harry, may I relate on the attendance, in order — I would like to put some attendance statistics in as to what these different class A teams draw, so we can understand what the gate is we are talking about. Would that be appropriate?

Q. Please.

THE COURT: Well, it's up to Mr. Harry.

Q. Yes, I would like that, Mr. Byers. A. I thought you might be interested in this. When you take the football divisions — let me come around differently.

There are six hundred and forty-eight four-year institutions conducting intercollegiate football in the United States, in 1981.

The total attendance, paid attendance that they — I may have to hedge that, I am not sure that's all paid attendance. Some of this may be straight gate count, in which some complimentary tickets may be included. So let me qualify it to that extent.

But the attendance as recorded at the institutions total thirty-five million eight hundred seven thousand forty people.

Now, there are four hundred and ninety-six institutions of the N.C.A.A. — these are the four-year, degree-granting, regionally accredited institutions — four hundred ninety-six members sponsoring college football. There are obviously [770] institutions that don't choose to belong to the N.C.A.A., or don't qualify.

Now, go to one A; there are approximately ninety-seven institutions, and they average attendance of thirty-four thousand six hundred twenty-one people.

One double A has ninety institutions, and they average ten thousand nine hundred twenty-seven people.

And division two, there are a hundred and twenty-one institutions, they average four thousand six hundred twenty-nine.

And division three, there's a hundred and eighty-eight, and they average two thousand two hundred thirty-eight spectators.

Now, I just submit that in remarking on your earlier question, Mr. Harry, that no — that gate attendance is important. Maybe thirty-six thousand doesn't compare favorably of the sell-out status of Oklahoma, but there's only two, three, or four institutions that have a sell-out stature of Oklahoma. And the dollars, at whatever level, are extremely important to the programs you are trying to finance.

Q. Give the illustration with Michigan, if you will. A. Well, the University of Michigan, which is the attendance leader in college football, sold out every game, hundred and three, hundred and four thousand spectators; of course, has a substantial income.

[771] Interestingly enough, Michigan is very much in favor of television controls. Michigan does not, because of its huge stadium and number of seats, marginal seats —

Mr. Coats: If the Court please, I object to that, whether it's favored or not. It's immaterial.

THE COURT: Sustained.

Q. Do you know the average price of tickets in the one A games now? A. I would imagine the average would run eight, nine dollars.

Q. Now, Mr. Byers, since the television controls were instituted in the early 1950's what has been the difference between gate attendance then, and gate attendance now at college football games? A. It has steadily increased each year since the early Fifties. I forget when that dip occurred, but it started back up and has continually climbed since that time.

Q. And is there a ratio you could apply comparing the present to the early Fifties? A. I am not sure what you mean, ratio.

Q. How much has it increased? I don't mean in — A. I don't have that —

Q. All right. A. — in my head, Mr. Harry.

Q. That's all right. [772] A. It's been a steady three or four, five percent a year increase.

Q. Thank you.

Now, has the association, the N.C.A.A., continued after these organizational controls to consider the matter of the effect of college football television on game attendance? A. Yes, sir.

Q. In what way? A. Well, as I suggested, the N.O.R.C. study, I believe, for six or seven years, up through '57, and even in that time and subsequently for each plan, the television committee has held, invited — held hearings and invited members to address it as to what they wanted the plan, the next plan to be; these traditionally were in two-year sequences. I believe at the start we may have only gone a year at a time. Then in the mid Fifties or so, I believe we went into a two-year

sequence, so the plan was short-term, to try to keep it current and adjust them to the goals of the television industry, and to the effect it had on college football attendance.

But the committee would regularly hold hearings. It took questionnaires — undertook questionnaires of the membership, as has been discussed previously, as concerning 1977, I believe.

Q. Those are not in evidence. [773] A. Excuse me. Well, regularly took questionnaires of the membership to see what they wanted, and proceeded in that manner to try to meet the membership's needs.

Q. And have you, yourself, paid attention to the effect of television on gate attendance throughout the years? A. Oh, yes, sir. That's one of our jobs in our office, is to gather those statistics and look at television ratings. We chart that all the time, to — you have to approach this issue from the standpoint, is there an infinite audience with college football? Is there an infinite audience?

It is clear if you look at the ratings, and I won't bore you with that at this point, or if you look at the attendance, there is not an infinite audience of people to either watch college football on T.V. or go to the stadium. Yet, there's a group, and a big group, that likes college football.

Well, you have to — if you are going to increase your ratings and increase the number of households that are watching television, from the present, well, an eleven rating runs you about nine million households, and you would suddenly turn television loose and run that rating up to take twenty-five million households, as an extreme, you simply have to realize you are taking some people away from going to a game, to stay home to get your T.V. ratings up.

You can't have high T.V. ratings and high attendance. [774] assuming you are bringing in a whole new audience of supports of college football. The history simply does not support that type of rationale.

So — I wandered a bit from my point that we continually compare attendance to ratings, to plan and work and see where we should go with this T.V. plan, or future plans as these evolve.

* * *

[795] Q. Mr. Byers, the testimony is that there has been a limitation on appearances of one college football team onto the national television contract over the years. You said already it started out as a team can only be on once a season, in the early days — A. Yes, sir.

Q. — of the plan. Now it can be on how many times? [796] A. It can be on six times.

Q. In two years? A. That's correct.

Q. All right. Now, what is the reason for limit — for limiting appearances? A. Well, there are historic reasons, and they are as valid today as when starting out. The first concern, back in the Fifties, was the very real one in that research showed, and personal experience showed — personal experience in the form of respective institutions — that television would have an adverse impact upon gate attendance. That was the motivation for the membership adopting football television rules.

Secondly, and very early in all of these reports in the Fifties, you will find a very grave concern that unless there is some spreading of opportunity here, the T.V. aristocracy of four, five, or six teams will monopolize television today and tomorrow. And that has been a consistent concern among — through all these years, up to the present time.

Sure, there are traditionally strong teams, even under the present system, but it would vastly narrow, if you did not have some rules that would spread these appearances among institutions conducting major programs.

Q. Who selects the games? [797] A. The networks.

Q. And on what basis? A. They select it on the basis of the appearance rules. They have to adhere to the requirements of the plan in the selection of the games, but the selection of the games, themselves, rests in the networks' hands.

Q. What do they want? What do they select? A. Well, they select the best games they can get under the ground rules, the best they can get under the plan and ground rules.

Q. Now, has the committee, with you participating, considered over the years the consequences of not having any appearance limitation? A. Oh, yes. That's regularly — that's regularly discussed, and surveyed by the committee, by mail and by personal appearances.

The fundamental question is, "Do you want to loosen up appearances and have more opportunities for major teams to get on, the ones that are getting the maximum" — and there are only a handful of teams that get the maximum now — "do you want to take all controls off?"

Those questions are opened up each time you get into a plan.

Q. What has been the thinking of the committee on removal of all controls? [798] A. They have been unanimously against it, based on the evidence at hand.

Q. Why? A. Because of the reasons I said. It would have a disastrous impact upon television's judgment, and I concur with that, and it would turn over to the few powerful teams the maximum rewards that will accrue them from television.

Q. Has a committee — A. You must bear in mind, Counselor, there are only about ten or fifteen super premium games in college football.

Q. You mean in what period of time? A. In one year. You only have maybe ten really strong games that are block-

busters. Everybody else, there's a whole myriad of other games, you see, and if you don't have some program here to spread these opportunities, you are going to have this television concentrated on these premier games, very high money, and very low money for the balance of the games available.

An appearance rule, I suggest, is critical to spreading these T.V. opportunities among the vast majority of the division one A games and teams.

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[800] Q. Now, has the committee, over the years, television committee of the N.C.A.A., considered whether its plan that it's recommending and the members ultimately adopt, could the objective be accomplished by having less restriction than it actually embodies? A. I'm sorry, I am not clear on the question.

Q. Let me ask that again, sir.

Does the committee evaluate the area of extended restriction and consider the need for restrictions in making up the plan? A. Yes, sir. I thought I responded that it does, that each time it gets into the preparation of a new plan as to — as to whether we should have the same restriction, less restriction, or more, for the future.

Q. Fine. Now, as to the present plan, that's exhibit LT, do you believe there are any less restrictive controls that would accomplish you purposes? A. You are talking about the '82-85 plan?

Q. Yes, I am. A. The thing is, the '82-85 plan is a very studied, well-thought-out plan, to expand the amount of college football television, which has expanded dramatically with two conventional networks plus a new entire cable series. It's an expansion, and it's very carefully thought out to see whether this expansion will hurt attendance.

[801] The point of the committee is that if, in this really major adjustment in providing more college football television than has ever been available before, the committee hopes that attendance will not decline. And if the attendance keeps on the upward path that it has been, then, clearly, the committee will, of course, be delighted about the results of the plan and will undoubtedly consider further loosening in the next deliberations.

* * *

[811] Q. Now, what is the importance to an institution as of this coming season, let's say in the past season, to getting its game on television? What does it mean to an institution to be on N.C.A.A. television? A. Well, this may seem somewhat ironical — if that's the right term for it — but a great many division one A institutions value the exposure in the television almost as much as the money, if not more.

Q. Why? A. For two reasons: television exposure helps the first part — the party of the first interest is the head football coach, because he's recruiting, and he wants his institution known and identified to the high school prospects in the area where he is recuriting.

If he walks in, the prospect doesn't even know his institution, where it is, or hasn't seen it on television, he automatically is coming in a step behind the coach who has [812] frequent T.V. appearances.

So the first party is going to be the head football coach.

Another party of interest is the president. He wants his institution exposed because we are at a point now of where the great baby boom is passed through higher educational institutions, and if you look at all the charts, enrollments have peaked or slightly turned down.

Exposure to prospective students, to high school counselors, or whatever, by institutions — the institution named, plus the — in each telecast there is a segment devoted to the

institution, itself. It's an educational message in behalf of the participating teams. So he values a great deal the exposure of his institution as an educational agency to the areas in which he hopes to attract students.

Q. Thank you.

Now, would you tell the Court, Mr. Byers, generally what the history — without going through all the details, but what the rights fees were when you first started with your committee negotiating network contracts, and what they are now?

• • •

[813] A. In 1952 — may I answer it this way? And if you need the figures, I can get them out of my briefcase, but in the period of 1952 to 1962, in other words, the rights that were paid in '52, when you take them to '62, represented three hundred and forty-six percent increase.

The rights from 1962 to 1972, the next ten-year segment, represents a hundred and sixty-four percent increase.

And the minimum rights contemplated in 1982, when you take that span of 1972 to 1982, it's a three hundred and ninety-two percent increase.

• • •

[816] Q. I want to make that clear. All the membership of C.F.A. institutions, colleges and universities, are also members of the N.C.A.A., aren't they? A. That's correct.

Q. And that — is the C.F.A., itself, a member of the N.C.A.A.? A. Yes.

Q. What is — in what capacity? A. Allied member.

Q. So that out of the ninety-five or ninety-seven in one A now, as it's restructured, sixty-one are C.F.A. members? A. That's correct.

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[817] *Cross Examination by Mr. Coats:*

Q. Mr. Byers, I gather from your testimony that there has been, over the years, since the inception of the plan, a substantial increase in college live attendance at college football games? A. Steady increase, yes, sir.

Q. In fact, the television reports for 1981 report would show that since, say, 1954 to the present time, to 1981, the attendance has doubled? A. I would like to look at that chart, if I may.

Q. Yes, sir.

MR. COATS: Let me, for the record, indicate that I am handing you what has been introduced as Plaintiffs' Exhibit One Thirty.

Q. Referring to page fifty-four, I am asking you to compare the figures in 1954 to 1981. A. An increase of seventeen million to twenty-three point four. Is that your point, Mr. Coats?

Q. Yes. Almost double. A. That followed the four-year decline.

Q. Yes. So the answer to my question is, from 1954 to 1981, it went up from seventeen million to thirty-five point eight million; roughly double? [818] A. That seems to be correct, sir.

Q. Now, you also indicated that over that same period of time, that the N.C.A.A. was allowing some more and more television as they went along? A. That's correct.

Q. So you started with one appearance, and then you went to more than one appearance, and then you went to regional games, so there has been a concomitant expansion in the television that's available? A. That's correct.

Q. Even on to the time now, in the next year, when we will have quite a number of hours on television during the day, on Saturday, of college football? A. Well, the C.B.S. and A.B.C. games will be on Saturday afternoon, the Turner Broadcasting games will be on Saturday night.

Q. Yes, sir. How long does it take to play a game? A. A televised game is approximately three hours; a nontelevised game will come in two hours and twenty minutes.

Q. So on Saturday, for the next two years, we will have roughly nine hours on television for viewing of college football games? A. Well, we — I am not sure.

Q. "We," the viewer? [819] A. Well, depends on whether you have cable. If you don't have cable, you are not going to get the Turner games. So if you are talking about conventional T.V. households, you will have the A.B.C. and C.B.S. telecasts.

Q. You will have six hours, and if you have cable, you will have nine hours? A. That would be appoximately correct.

Q. Mr. Byers, those facts, doesn't that actually prove that the increase of attendance is concomitant with the increase of availability of television? A. No, it does not, because what you are saying is that you are assuming with great expansion of available coverage of T.V. in '82-85, is automatically going to increase in kind, but there's no evidence.

Q. Historically, one has grown as the other has grown over the whole years of your plan? A. Attendance has grown, but under a very carefully controlled television policy. That's the point I am trying to impress upon you, sir.

Q. And what I am suggesting is that it may have suffered its bumps back in the Fifties, but haven't we come to a time when you are going to have nine hours on television, and the attendance has doubled. A. That's almost non sequitur, to say you are going to put on nine hours on television and retain the attendance.

[820] No, you are not going to accomplish that, if you are going to have that available to viewers.

Q. You say there's some — A. The N.C.A.A. football plan traditionally has been directed toward learning to live and use football television for the advancement of the sport. And we have worked very diligently to combine both attendance and—in-person, in-stadium attendance, and television. So one helps the other.

Q. Yes sir. A. And that is what we have been working on, and we feel good about that. But the membership that lives with this thing day in and day out, and the athletic directors who live with this all the time are not in favor by all surveys and discussions we have had.

Q. Mr. Byers, that's beyond my question, and that's been ruled out. A. I'm sorry, sir. I was telling you how we arrived at the conclusion.

THE COURT: Just answer the question.

Q. Mr. Byers, as you continue the expansion of television, it's — you know, it's possible that you would expand to three-network at some point in time? A. It's conceivable.

Q. And other cable and V.H.F. packages? [821] A. You have to deal with the future when it gets here, sir.

Q. That's right. At some point in time you could have television football on all Saturday, really, couldn't you? A. Well, I suppose if you want to speculate, we could have twenty-four hours of television football, seven days a week. I really don't think that's the point.

Q. The point is, at some point in time, you would come to the point where you would even — perhaps even you would say, "Look, we've got so much on now, it has no effect at all upon the live audience"? A. Well, I am not sure — I am not sure what you are asking me at this point.

Q. Well, what I am trying to get is the relationship between live attendance and television. They have both grown on the curves you have, continued their paths until now you have nine hours on television, there's only, possible — suppose maybe a few more hours where there could be a college game on at some point in time. Doesn't it become logically completely irrelevant as to the live attendance? A. Well, Counselor, I think one of the problems in the illustration and discussion you are making here, is that you are saying "nine hours," meaning that in one market you have one game for three hours, and then there's going to be [822] another game for three hours, and then you come back over here at night and there's going to be another three hours at night.

When you turn television loose, that's not what happens. Because what you — if you have no television controls — and we will take Tulsa, for an example. What you would probably have in Tulsa is three games simultaneously on the three networks. You probably would have an independent station with a game, and you might have, in this three- to six-hour period that you are talking about, five or six different games. That, by itself, would enhance the impact adversely on in-stadium attendance immeasurably, in my judgment.

Q. We'll talk about that in a minute. Let's take that a little further. My understanding is that you are concerned about freeing-up television because the kind of "super powers" would take over, is that — A. I do not agree with that. That testimony has been made in this courtroom, and I don't agree with that. I have heard it, and I don't agree with that.

Q. So you don't — A. That's not the reason that we developed the plan that we have, because the C.F.A. threat forced us to do that, and that was a testimony here, and I don't agree with that at all.

This plan was based on very careful study and calculation [823] as to what was the best interest of the member colleges and the present circumstances as we know it.

Q. Well, okay. I want to be sure about that, because I had misunderstood you. I thought you said there was a good deal of fear, and part of the plan was based on the idea there would be a super power elite — A. A control —

THE COURT: That was the way I understood your testimony.

THE WITNESS: No. What I was trying to say, Your Honor, that the reason for control limiting the number of appearances of teams to every two-year period, we have kind of come up to three, or six in a two-year period, now, but the reason for limiting that is so the super powers don't get all of the good appearances, and they are spread among other teams.

THE COURT: That's what he is asking you now.

THE WITNESS: Then I misunderstood your question. I'm sorry, Mr. Coats. I misunderstood your question.

Q. So there is a figure that is part of your plan, that the plan is designed to avoid, and that is for letting the super powers sort of take over? A. The limitation on appearances is directed towards that objective, yes, sir.

Q. So — [824] A. I am sorry, I misunderstood you.

Q. Okay. So that by allowing Notre Dame and Michigan, allowing the network to select Notre Dame and Michigan to be on television, and limiting these kinds of other broadcasts you have talked about from the local institutions, somehow that protects or enhances the local stations able to do so? I don't follow that, and I wish you would explain that to me, please. A. Yes, I understand what you are saying.

Q. Yes. A. I don't agree with the surmise that you make, Mr. Coats, because if you turn television loose, which I assume is your premise, you are assuming that there is only going to be one or two games. And whatever market we want to discuss, we can discuss Tulsa or Oklahoma City, or whatever, taking Tulsa, you are making the assumption that there will be one or

two games, Oklahoma will go to Tulsa and maybe Notre Dame, and then Tulsa will be on the third station.

It's my considered judgment, and judgment of the people who worked on this, that will not happen at all.

Do you want to — shall I go on?

Q. Excuse me, let's go further. You heard Mr. Mohr's testimony yesterday, that he wanted to have on a Southern Cal game, for example, in Los Angeles, opposing on the network a national Notre Dame-Michigan game. [825] A. Yes.

Q. But the N.C.A.A. wouldn't allow that to happen.

Now, how is it that — let's assume it was Long Beach State, or someone else. How is it that that protects the smaller schools and prevents this super power elite from dominating? A. Mr. Coats, Mr. Mohr is looking today at the present circumstances. He evaluates ability to purchase a game and put it on On T.V., as attractive, because the N.C.A.A. plan restricts the number of colleges that can go on conventional T.V., and the number of times they can.

If you were to turn it loose, On T.V. is not going to be a buyer.

Q. Well — A. The conventional networks will buy U.S.C. and put them on every day in Los Angeles, and On T.V. will not be able to compete because they don't have enough subscribers to pay the television rights.

Q. Let me understand you. Your concern is that the schools like Kansas and Tulsa, and schools that have not been predominantly football powers over the years would not get chances to be on television? A. Under what circumstances?

Q. If they were turned loose, that they would not get a chance to be on television? [826] A. No, they would not have as good a chance to be on television under that condition, as they do to be on television under the current plan. Their chances would be less.

Q. How many times has University of Kansas been on television in the last ten years, under your plan? A. I don't have that data here. They have been on, essentially because I remember seeing it, but —

Q. How about like the University of Virginia? How many have they been on? A. I have heard testimony they haven't been on very frequently.

Q. The truth is, by allowing the networks to select the games under your plan, really what you have done is allow them to decide who the powers are going to be across the country? A. That's not correct, because our plan carries in it a minimum number of appearances that the network has to telecast. So what you have is a cap on the number of appearances that the super powers can have, and then you have a mandatory requirement that the networks have to put on so many different teams. Through those two devices, you spread appearances to almost all worthy teams.

Now, you use Virginia, I don't have Virginia's won-and-lost record here, but I don't think anything can be obtained by forcing a team on that hasn't won any appreciable [827] number of football games, and I suspect that's Virginia's problem.

Q. All right. Well, excuse me, but I thought one of your objections to the C.F.A. program was that there were appearance requirements, and you said it wouldn't be any good because they had to be on, had to put the appearance — A. I didn't say it wasn't any good. I was pointing out my memory of contracts. They wanted to get all sixty-one teams on, and when N.B.C. indicated that wasn't desirable because the problems I just cited, I think they went to a million-dollar guarantee in money. Now, I don't know what the final papers reflected, of course.

Q. We may take that up a little later. A. All right.

Q. Now, but back to my initial question for a moment, if you — if you start off with the idea that there is some connection between television and live gate attendance, and you see over the years a doubling of the live gate attendance, and you see substantial expansion in the availability of T.V. on television—on Saturday college football games, wouldn't you logically come to the point where you have so much of each that one no longer protects the other? A. I don't — you can make that kind of projection; I don't happen to agree with that, no. If you look at the attendance chart, I would like to look at that again, that [828] you showed me a moment ago. Is that permissable?

Q. Sure. A. You are taking a period of time—if you refresh my memory on that—from 1954 to when, Mr. Coats?

Q. Eighty-one. A. — to '81. I would like to point out to you that the increase in attendance — attendance in 1981 was point seventy-five. That's the smallest attendance increase, I believe, and I am just hurriedly studying that, for almost the last eight or ten years. I don't see anything, you know, to give great optimism that would lead you to project that in four years' time we can assume that we are going to have the kind of attendance increases we have had going back from 1952 up, because it's clear that our attendance is starting to peak, and we barely hit an increase this past year.

So based on that, I am just merely saying to you, it seemed to me stretching logic to assume that we can have this great, additional exposures, and automatically assume in the next four years we are going to have the kind of attendance increases that ran from 1954, which was your base period.

Q. Well, are — what you are saying, then, no matter how much the attendance increased over the years, and no matter how many additional hours television, you would still believe there had to be controls? [829] A. No, I don't necessarily agree with that.

Q. Then — excuse me. Is all we are arguing about is "when"? We say "now," and you say "not now"? Is that —

A. We are not arguing about a time difference at all. What we are saying is that the people who have to learn — the people who are responsible for administering these programs have to move in an educated and deliberate fashion to see that television doesn't destroy the programs that are so important to our institutions.

Q. Yes, sir. You have done that for thirty years. A. Yes. And we have been very successful in doing that. I want to point out to you, sir, that in that span of time, that the number of — I think it's an important statistic for you to consider in your projections — the National Football League in the last twenty-five years has moved and increased its number of teams by a hundred and thirty-three percent.

Now, what that has meant is that they have moved into major markets across the country in this span of time, and put teams in and dominated towns and cities where colleges used to be the dominating influence. They are now in twenty-eight, I believe it is, twenty-eight cities. And I think twenty-five years ago there were only twelve professional teams.

In that time, we have maintained and increased by some [830] thirty institutions the number of four-year colleges that sponsor intercollegiate football. In that same time we have had attendance increases for college football, and in that same time we have been able to expand television, but not have it hurt college football and not have the professional football television hurt us, because congress passed a law that recognizes they could hurt college and high school football.

What I am saying to you, sir, is that what this program has done, it's been good for college football, this very deliberate, studied process that we have gone through has been good for college football. It's been good for the spectators that go to the game, and it's been good to have the home viewers getting top games.

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[837] Q. Now, Mr. Byers, throughout that time, did the network pay — was there ever an incidence when the network paid more than the minimum aggregate fee for the proper year? A. I don't recall that, I wouldn't say positively, Mr. Coats, it did not happen, but I can't — I simply can't recall for the periods of time that you are covering.

Q. Well, I'm not trying to trick you, I think there was one — some testimony about a ten-thousand-dollar fee paid which might have been in excess, other than that, since—can you now recall any — [838] A. I will say it would happen infrequently; it probably did happen occasionally, but infrequently, that would be my best answer.

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[841] Q. Mr. Spence testified, and I think you heard me read from his deposition, that absent the year 19 — either '80 or '81, that in every other year in which he was involved, which goes back into 1971 or '72, that in every year the recommendations or the fee numbers for a national fee and a regional fee came to him from N.C.A.A., is that also your recollection? A. I don't have any problem with that, except as to who initiated it. Now, it's been my experience that in some years, A.B.C. requested the advice from the committee and in [842] other years, the committee, itself, made a recommendation to A.B.C., but beyond that distinction, where the recommendation began, I would agree.

Q. But in every year, there was communication between A.B.C. and N.C.A.A. television committee as to what rights might be appropriate for that year? A. No, not every year, that's not correct, sir.

Q. Which years were there not any such — A. When you are in a two-year cycle of plans, which we had been, I think for a substantial number of years prior to the 1978-1981 contract with A.B.C., usually, it's my memory, the price paid, a minimum aggregate compensation for each of those two years, remained the same. Now, that's my best memory.

Q. I see. And that was your exception to my question? A. Yes.

Q. It wasn't every year, but every time it became a subject for consideration, there was communication back and forth? A. Yes, that's my qualification, and, of course, in the four-year contract, the last four-year, it wouldn't happen in midstream because there was a consumer price index inflationary factor kicked in the last two years, and upped the minimum aggregate amounts.

Q. Do you know of any instances in which the N.C.A.A. [843] recommended a figure and A.B.C. did not accept that figure? A. It's my memory that on the six-hundred-thousand-dollar rights fee, which I believe prevailed in the last two years of the present four, the committee had suggested a different figure, and A.B.C. locked in at six hundred thousand. I can't tell you what figure was recommended, but that's my best memory on it.

Q. Do you recall what figure they suggested? A. The committee?

Q. Yes. A. I really don't know, Mr. Coats.

Q. Do you know of any other instances where they did not follow — A. It's my experience that there were changes in what either the committee recommended by request or by volunteering, but the changes would not be substantial. I'm not trying to debate that point with you at all.

Q. So that in most years, whatever the N.C.A.A. recommended, is what indeed the fee was? A. In most years, that's correct, but although A.B.C. at the same time had the authority and power to do what it wanted.

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[844] Q. Now, did it concern you or the committee at any time that it didn't appear that there was a lot of differential in the prices that were indeed the same year after year? A. No, I don't think it bothered the committee, and I don't think it bothered third-member institutions, it was a practice which the membership accepted and which the committee accepted on behalf of the membership, because they thought it was for the best welfare of college football —

Q. Well — A. — on both sides. I think the network felt the same way, Mr. Coats, that strength of college football was important for the game and important for good television.

Q. But the effect of that was to make the minimum aggregate fee the maximum aggregate fee and amount of fee paid each year, wasn't it? A. Not to the process you described, not make — if you used the words "the aggregate amount, the maximum amount," that practice did not do it.

Q. Are you just saying it just happened, it didn't — no forces made it happen, it just happened? [845] A. I'm saying that in the practice of the network going to the institutions and in many instances, the institution knew they had the power of a super power game of a premiere game, they — many of them would know that they had the power to hold out for more money, but exactly in the Jim Spence deposition that you read here, whatever day that was, the practice surfaced when Chuck Neinas — when he was commissioner of the Big Eight Conference, asked Jim Spence why he wasn't paying more — asked him to pay more for the Oklahoma-Nebraska game, and Jim Spence's response when you read it, was, "Well, I will pay more for Nebraska-Oklahoma, but I intend to take a regional game out of the Big Eight," which I think was an Iowa State game which is my memory, and I wouldn't pay as much for Iowa State.

Well, at that time, as commissioner for the Big Eight, Mr. Neinas could have said, "We are not going to give you

Nebraska-Oklahoma unless you kick that price a hundred thousand dollars," or whatever, but he didn't do it, no. Why didn't he do it? He felt he was taking money out of Iowa State's pocket in the process.

Q. I couldn't agree more with what you're saying there, and it seems to me that is the point. N.C.A.A. sits there and sees these things going on, sees the same fees every year, sees the minimum aggregate fee becoming the maximum and so forth and say to your people, "Gosh, guys, get in there, negotiate, this is just a floor, and there's a lot of money [846] out there and these networks are willing to pay it, get in there and negotiate for it," does N.C.A.A. ever do that? A. Excuse me?

Q. That's — did N.C.A.A. ever take any action in that regard? A. We — I don't agree with the characterization leading up to your question, sir, as to what kind of action we took in that regard.

Q. Well, I want to know if you did, did you take any action in that regard? You saw these things occurring, did you respond and react to them? A. Excuse me, would you mind stating the question — the question you asked me, please?

THE COURT: Try to pay attention to the question, Mr. Byers, I get the impression you are trying to change the question. Would you please do that?

THE WITNESS: Yes, sir. I'm not really trying to do that, I apologize, I have a little trouble sometimes following the question that he is asking.

THE COURT: Just listen to the question, it might be helpful.

Q. We saw the minimum aggregate fee stay the same, and you saw that, and you saw the payments each year stay the same, and you tell us that the institutions were free to negotiate, and that this minimum fee was merely a floor, my [847]

question to you is, what did N.C.A.A. do? Did you get out and tell the members, "Get out and negotiate, you could get a lot more money if you do these things"? A. The members — most of the premiere institutions knew that they had the right.

Q. Excuse me, Mr. Byers, I am really not asking what they knew, I'm asking what you did, what did you and N.C.A.A. do? A. Well, we informed our members through the reports that they had the right to freely negotiate and surely the district members on the television committee informed their members: Don Canham from the University of Michigan was on the T.V. committee, and informed the members of Big Ten; Chuck Neinas was in the committee from the Big Eight Conference, I assume he informed the members in the Big Eight.

Q. Did you personally do anything to get that done? A. No, I personally would not, it would not be my job.

Q. Did you direct Mr. Hansen to do that? A. I don't know that I directed Mr. Hansen, no.

Q. Did you come forward with any bulletins or memorandum saying, "Gosh, folks, we are missing a big opportunity here because this is merely a floor, and we could negotiate and get a whole lot more money for the whole thing," did you do anything like that? A. I'm saying in the reports, the minimum aggregate [848] fee was paid, and the members knew that was not a ceiling, as far as exhorting the membership to negotiate aggressively, we did not exhort them.

Q. Did you — did you see the telegrams that went out from A.B.C. to the member institutions? A. I had never seen them until you put them here in evidence.

Q. You were not aware that they said in an attorney correspondence with the N.C.A.A. contract, you are required to accept these fees? A. No, I had not seen those, no.

Q. Do you know of any occasion where somebody other than the one mentioned by Mr. Spence discussing with Mr.

Neinas where somebody went and attempted to negotiate a different fee? A. I believe that this is secondhand response to that, I believe Don Canham, University of Michigan, was athletic director there, at one time talked to A.B.C. about paying a higher fee for the Ohio State-Michigan game, and that did not carry forward to a — results of a higher fee, however.

Q. Mr. Byers, did it occur to you that maybe the reason that that wasn't happening was because you had put the school in a situation where they had no negotiating power, take the power away from them — A. No.

[849] Q. — because they don't compete with anybody else? A. Excuse me, I do not believe that we have taken the negotiating power away from the institutions at all. The institutions have the negotiating power to get more money for their premiere games, that power is there if your game is strong enough. The result of that, however, and let me give you an example, in the Big Ten, the result is that if they pay higher for Michigan-Ohio State in Big Ten, A.B.C. will turn around and not pay as much for another game in the Big Ten, that's the result, I don't think that's the result of what we have done. We have put a minimum aggregate floor under these prices so that the network won't grind down the fees paid to those games which have less bargaining power.

Q. Mr. Byers — A. There aren't enough quality games in college football to give enough teams the power to bargain over the minimum aggregate price, and that has been the results through the years, and we recognize that.

Q. Well, would you agree that the schools do have some obligation to maximize the income from their programs? A. Well, yes, I assume they want to do — within reasonable educational restraints, sir.

Q. Of course. A. Yes.

Q. And they haven't done that over the years. Now, [850] you know, why is it that these games you talk about that you think are more valuable, what fault happened to prevent them from being able to get anything else? A. I don't agree with your premise, sir, that the colleges have not maximized the income potential from television for college football, I think the system that we have set up, I think the bargaining that's taken place, and I think that rights contracts that have been executed, have indeed maximized college football's ability to draw strong rights fees in the marketplace, and I think if you look — if I may, sir, I think if you look at the cost per thousand, which figures we c[illegible]ow you for rights, the cost per thousand viewers, divided for the rights paid, you will find that college football is one of the highest priced cost per thousand for viewers drawn of any sports program in the marketplace.

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[851] Q. And you understand, Mr. Byers, that in an economic sense, when you have really only one buyer and one seller or even worse than that, you have one buyer and lots of possible sellers, you don't have any negotiating position? A. I don't agree with that. In an economic sense, I think we have exercised very strong competitive positions through bidding and in some instances, bidding and negotiating [852] the football T.V. rights under the N.C.A.A. plan, I think it's been a very aggressive business transaction in the open market place among all people that want to buy those rights.

Q. Yes, sir. "We" meaning the N.C.A.A., when they go — when they become the exclusive bargaining agents, not "we" meaning the individual universities? A. Excuse me, I missed the question.

Q. You keep saying, "We," and I assume you're saying, "We," the N.C.A.A., negotiated this and did all these things? A. Well, the colleges and universities through a deliberate process have approved a plan, a set of principles, have elected a

T.V. committee, the T.V. committee has acted for the membership in implementing the rules that the members have adopted about T.V. and sold the rights authorized by the membership.

Q. Let's talk for a minute about this selling and bargaining agent. As I understood your premise for the N.C.A.A. being the bargaining agent for football, it was to protect live gate attendance, is that the basis on which this whole system has arisen? A. No, I have tried—I have tried to speak to the point that it has several objectives.

Q. All right. A. One is certainly the reason it was initiated and still one of the most important, not the most important reason, [853] is to protect the in-stadium personal — in-person attendance against the deletory effects of live television.

Q. What else? A. The second objective which surfaced almost in '51, '53, or '54, and has been paramount ever since is to — is to limit the appearances of super powers so that there would not emerge a very narrow T.V. aristocracy dominating college football and later objective as we moved into regionalization of college football was to spread the appearance opportunities and the monies among more institutions who desire to maintain one A and one double A football programs. Those are the objectives as I see them, Mr. Coats, and remain valid today.

Q. All right. Well, let's take another example. You limit the number of coaches that a team can have, do you not? A. Well, we limit the number of football coaches.

Q. Yes. And basketball coaches, a member institution — "we" being the membership, they enacted the bylaws that implement that employment factor.

Q. And yet you don't become the entire employment agency, you don't have to hire all the coaches to do it, you do it by limiting the coaches and enforce said — A. Bylaws limit the coaches that the members may employ in those sports.

Q. Couldn't you have achieved exactly the same results [854] by limiting the amount and same dollars you had by simply limiting the number of teams that could be on television without the necessity for the N.C.A.A. becoming the chief bargaining agent and limiting the schools in which they could deal with? A. When you say, "you could limit the number of teams," you mean —

Q. Yes, a question of limitation, the team can only be on three times? A. And that would be the only rule?

Q. Yes, sir. A. No, sir, I don't agree you could achieve the objectives set forth by that, that's called hully-gully, that's been before the committee off and on, before the committee since the Sixties, that's a Texas term, but they adopted it to call it the hully-gully plan.

Q. I suppose that's why it seems all you would need to do, you would protect gate attendance by keeping the super powers off television and at the same time you would keep them from being super powers on television because they could only be on a few times and they would be free in the marketplace to do the best for their programs, why wouldn't that reach your same goals? A. I think several factors have discouraged the committee through the years recommending such a plan, in fact, it was [855] discussed preliminarily and not in detail this last time around. First, if you did what you had in mind, Mr. Coats, it's estimated that you would increase by — these figures are approximately, obviously, about forty-five percent the amount of college football that would go into a given market. We have run projections of a hundred. One that I think — most logical would be that you would have in any multi-station market — multi-station, I mean, more than the three principal network outlets that go into four or five, and any of those markets that you would have an increase of at least forty-five to fifty percent in football telecasting on Saturday afternoon.

Q. Let me stop you there. A. Yes.

Q. Wouldn't that be one of your purposes, to kind of spread it around and get more folks on television? A. That, in our judgment, would increase the damage to gate, because if you have a market, a choice, you have a choice under the current plan of two games, A.B.C. or C.B.S. And let's take Chicago, or any of the major markets, concentrate on Chicago, under the system that you propose, it would be estimated that certainly you would have a game on each of the three owned and operated network stations in Chicago that would be the start. You would have one on W.G.N. for sure, and probably have one on U.H.F., which would be five games in [856] Chicago, and maybe even six games. What you have done is give the spectators of Chicago, who liked college football, many more choices, over reasons to stay home instead of go out to a college game.

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MR. COATS: Anyway, your answer is that simply placing a limitation on there, in your judgment, would increase the amount of television, and I wonder if that couldn't also be altered by decreasing the number of games again? A. Well, I didn't — if I may finish —

Q. Sure. A. — commenting on the other reasons why the committees felt it was undesirable. I think what — I think what you also find is that the — the premiere games would [857] be — would be taken by the networks, there would be fierce bidding for a group of premier games first; Notre Dame games would be for most, probably the second bidding process would tie up the major conferences, and I think you would then find a network trying to buy Big Ten and Pac Ten together as a unit and in that process, I think you will find that there would be a lessening of appearance opportunities that are mandated under the present plan because what you would have is a hully-gully situation where the networks are buying the premiere games and what is left over is small regional presentations for the second strata of one A. At the present time, the second strata

one A. those are the teams that we think ought to try to be — remain competitive and catch up with the leaders, if you buy the Iowa States of the world in the Big Eight or the Vanderbilts and L.S.U. or T.C.U., Vanderbilt and T.C.U. in the Southwest Conference — under the present plan, when those institutions get on regional, they have a broader audience base, and they get more money. Under the hully-gully, the institutions, the second strata, and if you want to drop down below that, would be on fewer stations and receive less dollars. There's a third factor that I think you ought to consider, Mr. Coats, and that is I think as far as the presentations on behalf of college football, I'm talking about the way the network treats the game, I think you will find that you would be — and the number of commercials and type [858] of commercials and the requirement we have that you put on a minute of a higher education message and also put on educational messages from the two participating institutions, I think that would all go by the board as the proper standards of presentation in the proper restraints on commercials.

For example, we limit the number of commercials. We began some types of advertising; all that would be governed by, you know the — determining the lowest common denominator because those standards will go down the tube in that kind of hully-gully situation.

Q. Excuse me, that is not so you can buy a fiat and limit those by placing the — limiting the universities exactly as you could do the other restraints? A. Your rule was, you only had three appearances a year, that's the way you set your question up.

Q. If I did, then I misled you and I didn't intend to because all I'm talking about is the question, if you have to be the bargaining agent for them or — whether you can do the same thing by ruling which leaves the universities free to negotiate their own — negotiate with whoever they want to and it's that distinction I haven't seen a valid reason for, and still

haven't heard one. A. If you're saying, take all the terms of the present plan and put them in the bylaws with the only exclusion being then that as long as you obeyed the plan as it's embraced [859] in the bylaws, you are free to do what you want, my answer — first two answers remain the same. You could build in the commercial restraints, the educational messages, the announcer approvals those type of standards of presentation, you could, I presume, put that kind of detail in the bylaw, I still think my first two responses to you are applicable.

Q. You know, you're dealing — first of all, I think we have your third factor. Now, back to your second factor, the schools that you say you're trying to protect, the middle level one A schools, and you have heard testimony from these other prople, they would love the opportunity to put those very schools on television, and those are the ones that never get on the—your package and yet you're saying somehow you are protecting them by eliminating their opportunity to be on regional television? A. First, we are not trying to protect them, we're trying to help them get on television, but the testimony that you have had before the Court, Your Honor, on the desirability of these marginal teams is only because these potential buyers see them desirable because they are limited and not on television, as such, under our plan. In other words, they look — even on T.V. looks at U.S.C. and says, "U.S.C.'s taped games are very valuable to us," it's because our plan limits U.S.C.'s appearance in the Los Angeles market. If you free up television so these teams can go on on a Saturday, [860] the market, to the extent that I have spoken to, Knasas, Mr. Coats, or Iowa State, in my judgment, is not going to get the kind of coverage and amount of dollars that they do under the present distribution system of the N.C.A.A. plan.

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[884] Q. All right. I got the idea from what you said earlier, that you had stated that if television was opened, that the value of these packages over the years would have been dramatically

affected, it was the exclusivity and the controls which has helped increase the value of the rights fees? A. I think that the program we have conducted has resulted in greatly escalated rights fees for colleges that I already detailed in my testimony.

Q. And that that would not have happened had there been—had other schools been free to go out and do other television when they wanted to? A. If your question is — I'm not — if these responsive — I'm not convinced that you increase the total amount of dollars spent on college football by having no controls whatsoever, is that responsive?

Q. Well, it helps. So that the exclusivity has meant money as far as the amount — the contract price over the years, the fact it was exclusive has increased the value of the contract, hasn't it? A. The fact that there is — the fact that every television market in the country is not saturated with all forms of college football on Saturday afternoon, I believe has enhanced the value of college football, and I think [885] Jim Spence addressed that point in his deposition, at least the way I heard it, when I heard it the other day, I agreed with Jim's assessment. I think that's true. That the flooding of the market does not enhance the value of college football and also in my judgment, damages attendance at college games.

Q. All right. Let me see if I can get an answer, ask a question where I can get an answer that is, yes.

Is there — is the fact of the exclusivity had an increasing effect on the dollars that you could receive by negotiating this package? A. You're talking about the current contract?

Q. At any time, Mr. Byers. A. Well, I respond to the word "exclusivity" the same way I responded earlier in my testimony because I do not think these three contracts now in place between N.C.A.A. and three different networks are — are exclusive. I think that the prices that have been received from these three contracts are enhanced by the fact that the markets — T.V. markets on Saturday afternoon are not flooded with all forms of college football.

THE COURT: Why don't you try again, Mr. Coats.

MR. COATS: Yes, sir, I think I will, I'm sorry.

THE WITNESS: Am I missing something?

THE COURT: Either that, or you are evading it, sir.

[886] THE WITNESS: I'm certainly not trying to evade, I can guarantee, Your Honor.

Q. (Mr. Coats, continuing.) Does the fact of the limitations — do you like that word better than "exclusivity" of the N.C.A.A. television package and plan and contracts have an increasing effect, have a generating heightening effect, in terms of dollars you can receive for the sale of the rights? A. I though I responded to that by saying that the fact there is only three programs on, as opposed to having unlimited football T.V. on, has enhanced the value of these three programs; isn't that responsive?

Q. Well, does that mean, yes? A. I don't — I guess it does, if that's the question you're asking.

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[893] **WILLIAM M. LANDES**

was called as a witness by the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

[894] *Direct Examination by Mr. Andrews:*

Q. Will you state your name and address, please? A. William M. Landes, L-a-n-d-e-s. And my address is 5727 Kenwood Avenue, Chicago, Illinois.

Q. What are your current professional provisions? A. I am currently the Clifton R. Musser professor of economics at the University of Chicago Law School, and in addition to that, I am a principal of a consulting firm called "Lexecon."

Q. What is the Clifton R. Musser economics chair? A. That is an endowed chair at the University of Chicago, set up by the Musser family to establish a permanent position for an economist at the law school.

Q. Doctor Landes, why is an economics professor at the University of Chicago Law School? A. It goes back, I would say, almost forty years that the University of Chicago Law School has had an economist as a full-time member of their faculty. And one area that I have been involved in, teaching at the University of Chicago Law School, has been antitrust.

In addition, there is growing research in the area or applications of economics to law in such areas as contracts and torts. And I, for example, have taught a course in economic analysis of law to both law students, and students [895] in the economics department.

Q. Would you tell us, Doctor Landes, about your other professional positions you mentioned, at Lexecon? A. I am a principal at Lexecon. Lexecon is a consulting firm that provides a wide variety of economic consulting services, primarily in the

area of antitrust, but not limited to antitrust. We work also in areas such as products liability, regulation, and employment discrimination.

Q. Who formed Lexecon? A. Lexecon was formed approximately four-and-a-half or five years ago, by myself and a colleague at the law school, Dick Posner, who was at that time a professor of law at the University of Chicago Law School, and Andrew Rosenfeld, a graduate of the University of Chicago Law School.

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[896] Q. You mentioned Richard Posner. Is he still with Lexecon? A. No, he severed his ties with Lexecon in December of 1981. He is now a court of appeals judge on the Seventh Circuit in Chicago.

Q. Are you affiliated with any academic journals? A. Yes. I am the editor — or an editor, there are now three editors — an editor of *Journal of Law and Economics*, which is one of the leading industrial organization journals in the economics profession.

Q. Doctor Landes, are you a member of any professional societies? A. The American Economic Association.

Q. Could you briefly describe for the court your educational history? [897] A. I graduated Columbia College in 1960 with an A.B. degree, and I received a PhD from Columbia in 1966, in economics.

Q. Could you state briefly also your employment history? A. Yes. My first full-time job after graduate school was as an assistant professor of economics in the department of economics at Stanford University. I then moved to the University of Chicago in the department of economics, as — again as an assistant professor. Then to Columbia University for several years as an associate professor. I spent a year-and-a-half at the graduate center at the City Center, University of New York, as

an associate professor. And in 1974, I moved back to Chicago, and I have been at the law school as a full professor since that time. And several years ago I was appointed to the chair of Clifton R. Musser professorship.

Q. Doctor Landes, in what branches of economics do you specialize? A. Macroeconomics, industrial organization, particularly antitrust economics, and questions such as definition of relative market, which is a branch of antitrust economics, and the economics of broadcasting.

Q. Is one of your specialties also quantitative or statistical analysis? A. Yes. I have done a good deal of quantitative and [898] statistical analysis ever since my dissertation, which the subject was on the economics of fair employment legislation, in which I tried to measure, using quantitative techniques the impact of state fair employment legislation.

Q. In addition to your work in this case, Doctor Landes, have you studied the economics of television and advertising? A. Yes, I have done a number of studies at Lexecon in that area.

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[901] Q. What was your assignment in this case? A. Again, I don't like to quite put it that way. I don't think I had an "assignment" in the case. I investigate the question of whether college football is a relevant market, or what is the relevant product market in this case, whether the N.C.A.A. has marketing power in that market, whether the N.C.A.A. is able to restrict output in the relevant market, and also I investigated the question of the effect of N.C.A.A. controls on in-stadium attendance.

Q. What did you do, briefly, to study those matters [902] in this case? A. I conducted a series of empirical studies, both the product market definition question and the in-stadium attendance question.

Q. Did you also become generally familiar with the issues in this lawsuit? A. Yes. I became familiar to the extent it was necessary to do the empirical work I had set out to do.

Q. At the outset, could you explain in a general way what these empirical economic studies were, and go into them in much greater detail later? A. Yes, I can explain them very briefly.

One, I examined the prices that — of N.C.A.A. programs, compared the prices of N.C.A.A. programs to programming prices in general.

I examined advertisers who advertise on N.C.A.A. programs and other sports programs, and programming in general.

I examined in-stadium attendance and did an empirical study of in-stadium attendance.

And finally, I examined data on viewship of N.C.A.A. football games, viewership patterns and demographic patterns of N.C.A.A. football and other sports programming.

Q. Doctor Landes, can you state briefly the conclusions which you reached as a result of those detailed empirical studies? [903] A. Yes. That college football is not a relevant market; the N.C.A.A. does not have market power in a relevant market; that the N.C.A.A. is not able to restrict output in an N.C.A.A. — the N.C.A.A. is not able to restrict output in the relevant market, even though the N.C.A.A. is able to limit the number of football games that are televised, that is not from an economic stand point equivalent to a restriction in output in a relevant market. And, therefore, the N.C.A.A. lacks market power in a relevant market.

And in the question of investigating attendance, what I found was that television — televising football games has an effect, adverse effect on in-stadium attendance.

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[904] Q. So that's clear, Doctor Landes, what does "price-fixing" mean to an economist? A. Well, from an economic standpoint, what "price-fixing" means is a restriction in output in a relevant market.

Let me put it a slightly different way: in order for a cartel to be successful, let's say, and set a price above the competitive level, which we would refer to as "price-fixing," the cartel must be able to restrict output. And, in fact, it's the restriction in output that brings about the increase in price.

So when we use the term "price-fixing," that's a shorthand way of talking about a restriction of output in a relevant market.

Q. Doctor Landes, does that mean that a change in price or an increase in price is, itself, objectionable? A. No. The increase in price is not objectionable. What's objectionable is the restriction in output, which leads to what the economist refers to as a "deadweight," or efficiency loss.

Q. In short, is a monoply objectionable to an economist because it is inefficient? A. Yes. I think I would say that's a very good way [905] to put it. It's not the increase in price, in and of itself, that is objectionable to the economist; what is objectionable is the restriction in output, which thereby makes for a higher price.

But that restriction results in a deadweight, or sometimes economists refer to it as a "social loss," or allocative loss, or efficiency loss. They are all roughly equivalent ways of describing the loss from monopoly cartels or price-fixing.

Q. Is the same thing true, that the economist's objections to limitations on output or price-fixing are because they are inefficient? A. Yes; I think that's — that basically is what I said just before, that it's the restriction on output. It's inefficiency or deadweight loss, allocative inefficiency or deadweight loss brought about by that restriction in output.

Q. Doctor Landes, do all agreements on price constitute price-fixing? A. No, certainly not. Let me expand on that and give you, I think the easiest way to see that is if I go through several examples.

The first example, suppose a group of lawyers, maybe ten or fifteen lawyers in New York, informally set up an agreement among themselves to form a law firm. They may, [906] prior to this time, have been directly competing with each other. They are no longer directly competing with each other, they may have a uniform price for legal services. In addition, they will devise a formula, or they will have some mechanism for dividing the revenues at the end of the year.

Yet, no economist would say that constitutes "price-fixing," because in this market, there are many law firms, many lawyers. This law firm, this set of twenty lawyers that have been — that have set up a firm, are unable to really restrict output and raise price. In fact, there are probably benefits of setting up the law firm in terms of reduced costs or efficiencies, or gains from specialization. So one wouldn't refer to that as a "price-fixing" agreement, even though the lawyers no longer are competing directly with respect to sale of legal services, and because they have a formula for dividing up the revenues.

Take another example, and one that I had some actual — actually somewhat more familiar with, is in the A.S.C.A.P. case.

In A.S.C.A.P., the composers and publishers have an exceedingly elaborate set of formula for dividing up A.S.C.A.P. revenues. And that formula is weighted, depending upon whether a performance is on a network, whether it's on a local T.V., whether it's on radio; and the composer and authors that receive this revenue. Certainly, that practice was never [907] challenged in the A.S.C.A.P. case.

What was challenged was the blanket license as restriction in output, not the formula that A.S.C.A.P. has for dividing up its revenues; that was never challenged, and certainly not found to be price-fixing by the Court in that case.

I also might add in the A.S.C.A.P. case, that in addition to the elaborate formulas for dividing up revenues among A.S.C.A.P. members, there was a weighting scheme in which a network performance of, say, a feature song, got an equal weight regardless of which network it was played on. how popular the show was on that network, whatever the network show or populatiry of the performance, a feature song would get the same weight.

Similarly, for them, music, and so on, although there was this formula, there was no attempt to gear it in a fine way to say the different degrees of popularity of shows.

Q. Doctor Landes, there's been discussed in this case, conference revenue sharing arrangements for television revenues, whereby the members of the conference pay into the conference the receipts they receive from football television, and then they allocate them back to the members, occasionally those appearing on television getting a greater amount than the other members of the conference. A. Yes, I think that's the same, really, as the [908] A.S.C.A.P. example, that the way the conference members allocate revenue among themselves has nothing to do with price-fixing—which, as I have indicated before, is a restriction in output.

Let me just finally get one other example. Suppose a series of entertainers such as Bob Hope, Barbra Streisand, Frank Sinatra, and a few others got together to set up a series of specials to be shown on prime time on the network.

Clearly, these people are going to set up some arrangement to divide up the revenues, and, yet, no economist would refer to that as a "price-fixing" agreement, because that program or that series of programs are now competing in a broad programming market.

Q. Does division of revenue among the joint producers have anything to do with consumer welfare? A. No, it doesn't, as far as I can tell. It's strictly—strictly an allocation of

revenue. The key issue is always, from an economic standpoint, whether the practice in question that one is examining, is one that restricts output.

In that case, it would harm consumers. If the practice doesn't restrict output, then, however the revenues are divided up, whatever formula the members, say, of a joint venture have for dividing up their revenues, that is not price-fixing, and has nothing to do with the economist's [909] objection for price-fixing.

* * *

Q. Doctor Landes, I want to turn now to the prior N.C.A.A. single-network contracts with which we have all had experience, such as the agreement between A.B.C. and N.C.A.A. for the years 1978 through 1981.

Are you aware that in practice the schools had been paid [910] by the network basically the same amount for all national games, and then a different price but basically the same amount for all regional games? A. Yes, I am.

Q. And from an economist's point of view, is that any indication of price-fixing in an economic sense? A. No, it is not. It comes back basically to what I said before. There are packages being sold to the networks by the N.C.A.A., the critical issue is whether there is some restriction in output in a relevant market.

How that revenue from the package is divided up among colleges and universities has nothing to do with the question of whether, from an economic standpoint, the practice is price-fixing.

Q. Doctor Landes, are you aware that the last N.C.A.A. football television contract with A.B.C. for 1978 through '81 contained a minimum aggregate compensation term which provided for a total sum of rights fees to be paid in each year of the agreement? A. Yes, I am.

Q. Why would you expect to find a minimum aggregate compensation term in that N.C.A.A. network contract?

* * *

A. I think that's a necessary accompaniment to the [911] N.C.A.A. network contract; that is, once you sign a network contract and negotiate and contract with a single network, that network is potentially in the position of what an economist refers to as a "monopsony," or single-buyer.

And with a large number of competing football games that could be shown on the network, in the absence of the minimum aggregate compensation, the schools, I assume, would get very little revenue.

What the minimum aggregate compensation does, it permits the schools to get some revenue from the telecasts.

* * *

[916] Q. Before turning, Doctor Landes, to your studies of the particular relevant market in this case, could you describe for us the television industry, television broadcasting industry? A. Yes, I can describe it very briefly.

There are basically five components in this industry. You have the viewers. You have the television stations which include the network affiliates, the independent stations, and those stations that are owned and operated by the networks. And total, it's roughly about seven hundred and twenty [917] stations.

In addition, you have the networks, which are essentially the brokers in this market. And I will explain that shortly, the three networks.

You also have the program suppliers, and, of course, the advertisers — the advertisers being the principal buyers in the market.

Q. Where do the television viewers in the homes fit into that? A. Well, as I said, the networks are essentially the brokers in this market. And what the networks do, they acquire programs, not because of any intrinsic value of a program, but because a program, when it's shown, say, by an affiliated station, will attract viewers. And viewers are valuable because advertisers value viewers. Advertisers are able to reach potential customers by advertising their products over television.

So the essential buyers in the market are advertisers. The networks can be thought of as the "brokers" that deliver viewers to the advertisers through an intermediary; namely, their affiliated stations.

But the essential buyers in the market would be the advertisers.

And then you have the program suppliers that provide programs to the networks, and networks also produce some of [918] their own programs, as do some of the independent stations.

Q. Are there many suppliers of television programming? A. There are many suppliers of television programs, including major studios, minor studios, the networks produce some of their own programs, various stations have production subsidiaries which produce programs.

I think everyone who has studied this market, the programming market, concludes it's a competitive market, and that includes a recent study by the Federal Communications Commission that looked at programming in general and concluded that the program supply market was a very competitive market.

Q. Is the N.C.A.A. one such supplier of television programming? A. Yes, it's one such supplier in this competitive market.

Q. Doctor Landes, does the N.C.A.A. have market power in this total television programming market? A. Well, the N.C.A.A. certainly does not have market power, because as I have indicated earlier, that on the basis of my studies, that college football is certainly not a relevant market; in a broad programming market, of which the N.C.A.A. is a part of, its share to be too small to warrant an inference that the N.C.A.A. has market power.

Q. Doctor Landes, could you give us a brief summary of the empirical studies that you performed? [919] A. Yes. I examined the relationship of N.C.A.A. program — N.C.A.A. football program prices, and correlated or compared them to prices of programming in general, which I found the prices moved together.

I examined the advertisers who advertise on N.C.A.A. programs. I again found that you did not have a specialized group of advertisers; that is, advertisers that were specialized to the N.C.A.A., but those advertisers that advertise on the N.C.A.A. advertised in a broad variety of programs not just limited to sports programming.

I also found that in terms of analyzing viewership trends in several geographic areas across the United States during the period of October and November, that in terms of a sports viewership market, the N.C.A.A.'s market share was far too small to warrant an inference that it had market power.

I also looked at viewership in terms of certain demographic characteristics, and again concluded inadequate N.C.A.A. share in terms of market power.

Finally, I did a study of attendance, though I am not sure that is the response to your question.

Q. Did you do an additional empirical study? A. Yes.

Q. Would you describe that? A. That was a study based over a five-year period of approximately — approximately

thirty-one schools, so that [920] each observation was attendance at a particular game for a particular school, that you had roughly seven hundred and fifty observations to work with, limiting the schools to the Oklahoma-Georgia area.

And what I intended to do there was use multiple regression analysis, which is a statistical tool that is used by economists and other scientists, was to try to measure what the impact of televised football, holding constant other factors that are relevant to the determination of attendance, such as weather, whether the game was a homecoming game, and various other factors.

* * *

Q. Doctor Landes, would you describe for us, please, Defendant's Exhibits ZB-two and ZB-three? A. Yes. Here what I did was to look at program prices, both the N.C.A.A. contract price per game and network, and T.V. station program prices.

Now, the purpose of doing this is — at least a purpose of doing this is to determine if two products are in the same market. It's a very common practice in the antitrust area to examine whether prices move together on the theory, if [921] products are linked on the demand and supply side; or the demand and supply side, if they are linked in this way, that their prices will tend to move together on the theory, say, that if you have two products, "A" and "B," and they are linked, or either demands or supplies, that if the price of product "A" were to start rising relative to the price of product "B," either consumers would substitute away from product "A" into product "B," which would tend to put a downward position on product "A," and upward price on product "B."

Or, if the consumers don't make the substitution, that suppliers would substitute toward product "A," which would tend to expand its supply and reduce its price, and away from product "B," which would tend to increase its price.

So that you would suspect, if the products were linked on supply or demand side, what you would suspect would be that the prices would tend to move together, and that is the test that I performed in what I have labeled in my report figure six and seven, but are labeled here ZB-two and ZB-three. I can briefly go over these if you would like.

* * *

[922] Q. Will you go on further and explain that empirical study? A. Well, let me just go back one factor in determining whether I would call it really one factor in determining whether products in the same market moved together.

And I want to emphasize the move together. It's not the level of the prices that are critical. For example, one could have a fifty-hour light bulb, and another light bulb that would last a hundred hours. And I would expect the light bulb that would last a hundred hours to be twice as expensive as the light bulb that lasts fifty hours.

But I would suspect that because of the demand among consumers on the supply side, that even if there is a difference in price of those two products, that would move together over time.

That is basically what one says in figure six and figure seven, in which I have the red line, refers to the N.C.A.A. contract price, the blue line is an index of programming and technical expenses for both the networks and the stations.

And they are all put on identical units. That is, it is on an index value, because it is clearly a tremendous difference in level, because the expenses of the networks and stations are over two million dollars a year.

And what is done is in 1970, they are set equal to the [923] value one. They are both set equal to a value of one. So they are on comparable units, so one can compare them.

And it's clear in figure six that what one sees is a similar pattern as to the movement in the prices in these two series.

However, I think this goes too far, because you have general inflation during this period, and prices in general were moving up, particularly in the late Sixties and early Seventies. So what I have done in figure seven is to deflate both series by the Consumer Price Index —

THE COURT: Pardon me, Doctor. You say in figure six and seven, are you referring to the exhibit labels?

THE WITNESS: Yes. I'm sorry, ZB-two is six, and ZB-three is seven.

And in ZB-three, what I have done is to deflate both series by the Consumer Price Index, so in effect, we are dealing with movements in real prices. We have taken away from the movement in these series, and we have taken away the price changes due to inflation.

Let me put it another way: in figure six, there is partially a superior relationship between the two series, because of the general relationship in the two prices. Figure seven attempts to deal with this by putting real price terms, by making adjustment for the Consumer Price Index.

And what I find in figure seven is, indeed, the two [924] series tend to move roughly with each other.

In fact, I also computed a correlation coefficient, which is a statistical measure, or how close the two series are. And the coefficient I think is about point seven or point eight in significance, indicating a close correspondence between the two series.

* * *

[925] Q. Doctor Landes, could you explain for us the source of the data which you used in compiling Defendant's Exhibits ZB-two and ZB-three? A. Yes. The N.C.A.A. data is straight-

forward, that comes from the N.C.A.A. contract price. The programming and technical expenses of the networks and the stations comes from the Federal Communications Commission's annual reports for each year, where they have a category called "program and technical expenses," which is principally programming expenses.

I believe they get the information from the network separately, programming and technical, but they compile it as a single number, program and technical expenses.

Q. Doctor Landes, what do you conclude from exhibits ZB-two and ZB-three, as to whether the televising of college football games is in a separate relevant product market? A. Again, I think it is one factor, the movement of prices. I don't think it's a sufficient — it's not sufficient in and of itself to conclude that the two products are in the same market, but it is certainly a factor that pushes one in the direction of saying that the two products are that — let me put it another way: that N.C.A.A. college football is not a relevant market, that it seems to be linked [926] to the prices of programming in general.

Q. Doctor Landes, could you explain for us what empirical study you did of advertising expenditures? A. Well, I did a study of the spots that were purchased by advertisers on N.C.A.A. programs, and then I looked at this set of advertisers — that is, those advertisers that purchased spots on N.C.A.A. programs — and I determined how many spots they purchased on other sports-type programs, and how many spots they purchased on programming in general.

The purpose of doing this, is this: if advertisers, which are the buyers in this market as I explained earlier, if advertisers have available to them substitutes, that is, if those advertisers that advertise on N.C.A.A. college football have available to them substitutes, then that would say you have got a set of buyers that can substitute across products. And you wouldn't want to define a market as limited to simply advertisers who

buy spots on N.C.A.A. football. Or putting it another way, a product market as N.C.A.A. college football.

Q. What did you use to study advertising in television in way of data source and so forth? A. Yes. Let me just — I think really, I want — I would like to explain a little bit more exactly the — if you would like some of the theoretical background to the study, because I think it's and important economic issue. And [927] from an economic standpoint, it strikes me as very relevant to the case.

And that is, we have identified the buyers in the market as advertisers. If you had, say, a group of advertisers that were specialized to some programming — some type of programming, for example, you had advertisers that were locked in and, specialized to college football, and that was the program under which they wanted to advertise their product, it was in effect an essential input for them in marketing their product, and then under some conditions one might say that the N.C.A.A. college football would constitute a relevant market, because it might be possible under those circumstances for the N.C.A.A., by restricting the number of games available, to reduce the number of viewers [to advertisers].

In effect, to thus set or lock in advertisement prices, and, therefore, raise the price to those advertisers.

And if you had a set of specialized advertisers, and it has to be, as I will explain shortly, a set of specialized advertisers that constitute a large share of the total advertising on N.C.A.A. football; if you had a specialized set of advertisers, it might be correct to define a market as limited to college football.

There is really one qualification I would like to make to that, and then a second subqualification.

The first is even if you have a set that are on — if [928] there are a number of advertisers that are also purchasing N.C.A.A. college football spots, but they are not specialized to

N.C.A.A. college football, those that are specialized are in effect protected from the exercise of market power by those that can substitute.

An example I frequently give in the antitrust class at the University of Chicago is dietetic soda. Suppose you had diabetics who could not substitute between dietetic and non-dietetic soda. So the diabetic is locked in, given the fact that he is going to be purchasing soda.

The fact that you have a set of customers that can't substitute between the two types of soda would not mean that dietetic or sugar-free soda was a relevant market, because there are a large number of other buyers of sugar-free soda that can, in the event of a price change or any attempt to restrict output of sugar-free sodas, those buyers that can substitute would shift to ordinary soda. And their ability to substitute is a bar for trying to exercise market power in the sale of dietetic soda.

So it is not just that you have a group of buyers that view the particular product as an essential, can't substitute away from it; those buyers constitute a large fraction of the total buyers of this product.

Second, still is the qualification to the specialized advertisers. Even if you had specialized advertisers because, say, the [929] N.C.A.A. was offering certain demographics that advertisers felt were necessary to market their product, it might be possible for other program suppliers, not those that produce program football, to produce programs that would have similar-type of demographic characteristics; and, therefore, even though you had this group that appeared to be specialized in the N.C.A.A. college football, that is a group of advertisers, if the N.C.A.A. were to try to restrict output and raise price to that group through limiting the number of games, that other program supplier would offer programs that were equivalent from the advertiser's standpoint.

That would be a supply side substitution example which would limit the exercise of market power.

Q. Doctor Landes, you have before you copies of Defendant's Exhibits ZB-four, ZB-five, ZB-six, and ZB-eight? A. Yes, I can certainly locate them.

Yes, I do.

Q. Doctor Landes, can you identify for us and explain to us what ZB-four is? A. Yes. I think before I do that, what I would like to do is briefly describe the data that were used here.

A computer tape was supplied to Lexecon by Broadcast Advertiser Reports, and they provided a computer tape to us which allowed us to identify every single spot that was sold on a network program, identify what program it was sold [930] on, who the advertiser was, and also B.A.R. has a product definition.

So it's not just advertisers, but you can look at products according to B.A.R.'s, product definitions, you can look at products and determine what products are advertised on what programs.

So what I did first to really get at this question of whether there appears to be a group of advertisers that are so specialized, so locked in to N.C.A.A. college football that they can't substitute away from college football in the event of a restriction in the number of games being shown on television, what I did was to identify those advertisers that advertise on N.C.A.A. college football.

And in table ZB-four, what you find is that for those advertisers that advertise on N.C.A.A. football on an advertiser basis, a little bit more than five percent of the network spots are on N.C.A.A. college football. And roughly twenty-four percent of their total spots purchased on network television are in sports programming.

And the overwhelming majority of their spots, seventy-five percent, are on nonsports programming.

If you do this on a product media that is not an advertiser media, for example Anheiser-Busch would be an advertiser.

On the other hand, on a product, it is broken down into Michelob and Budweiser. So you could get data for Michelob [931] and Budweiser separately.

What I find is on a product basis, of all the advertisers, and I think there are approximately a hundred and eighteen advertisers on a product basis, you find roughtly seven-and-a-half percent of the products advertised on N.C.A.A. football, roughly seven-and-a-half percent of those products are advertised on N.C.A.A. football, or thirty-four percent of those products advertised on N.C.A.A. football, or thirty-four percent of those advertisements, are on sports programming.

And again, the overwhelming majority, sixty-five percent, are on nonsports programming.

You just look at that table, it just hits you in the eye that, in fact, the advertisers that purchased time on N.C.A.A. college football are certainly not specialized to college football, nor do they appear to be specialized to sports programming in general.

Q. Doctor Landes, would you identify, please, Defendant's Exhibit ZB-eight? A. Yes, I have that here.

Q. Would you identify it? A. That ZB-eight lists — this is on a product basis, which I described the two bases before, product and advertiser. We list the products down here, these are all the products that are advertised on N.C.A.A. football in 1981.

The — for example, let's take American Express, which [932] is the first row. That's defined also as a product. American Express, less than one percent of their ads are on N.C.A.A. football. Less than one percent of their ads are on all sports. And roughly ninety-nine percent on their ads are nonsports programming.

Now, go to the second row. You have a different product for American Express, that's their Fireman's Fund, American Insurance. That product, sixty-seven percent of ads for that product are in N.C.A.A. football. Seventy-four percent on all sports. And twenty-five percent on nonsports.

And that would be the way to read this product.

Again, you can see Anheuser Busch, you can break it down into various types of beer, as well as Budweiser's art collection, which was apparently marketing some lithographs on N.C.A.A.

Q. Where did you obtain Defendant's ZB-eight? A. Where did we obtain the data?

Q. Yes. A. From the Broadcaster Advertiser Reports, Incorporated, which I believe is a well-known consulting and data-collection firm in the broadcasting area that is frequently — its reports are quoted in advertising magazines and broadcasting magazines.

They provided us with the tape, and then we actually made the computations from the tape, using computer facilities [933] at Lexecon.

Q. Is that computer tape the source of the data utilized in preparing Defendant's Exhibits ZB-four, -five, and -six? A. Yes. In other words, the basic data that goes into ZB-four, ZB-five, and ZB-six is from the appendices here. A convenient way, in fact, of again looking at the question whether there appears to be advertisers or a large fraction of advertisers that are specialized to college football programs is to look, say, at figure eight, where — what I have done in figure eight is to identify —

Q. Which exhibit is that? A. Excuse me, I'm sorry, ZB-five.

What I have done there is to identify the twenty largest advertisers, that is the twenty largest purchasers of spots on N.C.A.A. college football — the largest being General Motors. And you can see that less than ten percent of its networks spots are on N.C.A.A. college football.

The red gives you the percentage of the advertiser's spots on N.C.A.A. college football. The green area gives you the

percentage of all sports, other than college football. If you wanted to get the total for sports, you would add together the red and the green. So it's just the height of the green in ZB-five.

And then the blue area represents the proportion for [934] nonsports program.

And it's clear from looking at that table that here is a table constructed to pick out the largest advertisers on N.C.A.A. college football, shows that these advertisers have a wide variety of other programs in which to market their products.

Similarly, ZB-five — ZB-six, excuse me, is a similar computation in which it is done on a product basis. So instead of General Motors, now, we have — the first is Chevrolet autos. The second is General Motors, which refers to General Motors trucks. The third is Goodyear tires, Texaco, Schlitz, and then a separate product category called "Chevrolet trucks."

And you can just go down that and again the same pattern appears, that here are the largest, the products that — where you have the heaviest concentration of N.C.A.A. advertisers, and yet those products are marketed and advertised on a wide variety of other programs, sports programming, and even a wider variety of programming in addition to sports.

* * *

[935] Q. Doctor Landes, referring to the Defendant's Exhibit ZB-four, what do you conclude from that in that study was to whether college football is in a separate relevant product market on television? A. Well, again, I think if you look at the advertisers, you see they are not specialized to college football. Advertisers are the buyers in this market, and they have a wide variety of other programs in which they can reach their customers.

If you don't have this specialized locked-in group of buyers, then from that standpoint, you wouldn't define N.C.A.A. football as a separate product market.

But it's part of a broader programming market in which advertisers use not only N.C.A.A. college football, but substitute towards other types of programming for their advertisements.

Q. Doctor Landes, from Defendant's Exhibit ZB-four, do you draw any conclusion as to whether, even a market consisting of all sports television programming, is a separate relevant products market? A. I think that table four is very suggestive along those lines, and that is that sports programming to advertisers, [936] again the buyers in this market, sports programming in and of itself is not a special market, because you have all of the advertisers that are advertising on sports programming, yet they seem to be advertising a larger fraction or a larger fraction of their spots are purchased on nonsports programming, suggesting that there is substitution between sports and other types of programs for advertisers.

And coming back to the way we discussed the market definition before, with two substitutes, you want to include them in the same market, which would suggest that the programming market is broader than just sports.

Q. Doctor Landes, what do you conclude from Defendant's Exhibit ZB-five with respect to whether television of college football is in a separate product market? A. Again, it's the same conclusion, looking at ZB-five, you have got the largest advertisers on N.C.A.A. college football. If anything, that would tend to overstate the importance of advertising on N.C.A.A. college football; it shows that those advertisers advertise not just on college football, but all sports and programming in general.

And even for those advertisers, there seems to be programs that go beyond sports which are substitutable in terms of reaching potential customers.

So again, looking at ZB-five and ZB-six, one would have to conclude that the market was broader than just all sports [937] programming. It would include a great deal of other programming.

Q. Doctor Landes, in referring to Defendant's Exhibit ZB-six, do you have a conclusion based upon that study as to whether — as to whether college football television is in a separate relevant product market?

A. Yes. I think it's the same conclusion as before, that these advertisers — this is on a product method — are not specialized to college football. They don't appear to be specialized to sports programming. The market definition in terms of including products or programs that are good substitutes for one another from the standpoint of the advertiser is broader than sports programming.

Q. Doctor Landes, the plaintiffs allege in this lawsuit that the relevant product market here is simply college football television. You have said that's wrong, and that it's much too narrow.

Suppose, hypothetically, that the relevant market were as narrow, however, as all sports on television; did you perform a study to determine if college football would have market power — A. Yes.

Q. — in such a market consisting of all sports on television? A. Yes. I did, although I want to emphasize that I [938] don't believe the market should be limited to sports programming.

Q. Did you compile a table summarizing that? A. Yes, and that's referred to as Defendant's Exhibit ZB-seven, which uses the Nielson data, examines three markets, Chicago — three geographical areas, Chicago, Los Angeles, and New York, each for two years, 1980 and 1981, for two time periods, October and November.

And what that does is in each of those markets, what we have done, again using a Nielson tape that was provided to us, we computed the, for example, broadcast time that was N.C.A.A. college football. So we limited it to those — to that time period in which college football is shown, and you can see the numbers there are roughly between ten and fourteen percent of sports broadcasting time during this two-month period, is N.C.A.A. college football.

If you make an adjustment for the size of the audience, and that is, you basically weight these quarter-hours of programming, by the audience size as given in the Nielson reports, you find that N.C.A.A. college sports on a viewer basis.

Now, computing its share, not an hourly basis but on a viewership of sports programming in general, that share is somewhere between seven and twelve percent.

If, in addition, you go a step further and say — well, [939] let me look at a particular demographic group of males aged eighteen to forty-nine, which are, if you like, sports viewers — you find that again in terms of a share of those viewers during the two-month period, October-November, for these three geographic areas in two years, you find that the N.C.A.A.'s share is somewhere between seven and twelve percent.

These share numbers are far too low, even if you had a sports program market, to infer that the N.C.A.A. has market power.

But in addition, I think the share numbers, themselves, even limited to a sports programming market, are somewhat misleading, because what it ignores is the possible — even if they are just — if we have limited it, and taking your hypothetical, limiting it to sports broadcasting, it overlooks the possibility that advertisers can substitute across time periods.

Of course, in the month of October, when you have a particularly heavy concentration of college football, but these

advertisers advertising on sports programs can advertise in September, December, January, and they will make — they will substitute across these different time periods into time periods in which you have less college football.

So that if anything these numbers would overstate the N.C.A.A.'s share, if you limited the market just to sports programming.

I just might add one more thing. It also does not strike [940] me as meaningful to narrow things to say there is a separate sports programming market on Saturday, or separate sports programming on Friday, or separate sports programming market on Monday night, because, again, advertisers can substitute across days of the week.

It's as if one said that there is a spearate market for automobiles sold on Saturday, as there is for automobiles sold on Wednesday. It's clear that it would be ridiculous that if you wanted to find separate automobile markets by the day of the week that automobiles are sold, because consumers can substitute across different days of the week.

And, similarly, here advertisers can substitute across different time periods.

Q. Doctor Landes, has the summary to which you have been referring as the N.C.A.A.'s share of the sports broadcasting market, been identified as Defendant's Exhibit ZB-seven?

A. Yes, it has.

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[941] Q. Doctor Landes, what do you conclude from this entire series of empirical studies that you performed and described this afternoon, as to what is the proper, relevant product market in this case?

A. Well, it is certainly not college football. I think that the evidence is quite compelling that the market is broader than

college football. It's, I also think, broader than all sports programming on the basis, really, of the ability of advertisers to substitute across programs not limited just to substitution cross sports programming.

So that I would conclude that the N.C.A.A.'s market share in a relevant market, which is going to be a market broader than sports programming, is going to be too low to infer that the N.C.A.A. has an ability to restrict output, or raise price.

In short, I would conclude that the N.C.A.A. lacks power in a programming market.

Q. Let's turn at this point, Doctor Landes, away from the market power questions, and focus on whether the N.C.A.A.'s football television controls effect in-stadium attendance at college football games.

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[953] *Direct Examination Continued by Mr. Andrews:*

Q. Doctor Landes, after we left the courtroom last evening, did you discover an error in one of your graphics, Defendant's Exhibit ZB-two? A. Yes, I did.

Q. Could you explain what that error was? A. ZB-two, which is figure six, which is an index of N.C.A.A. contract prices per game versus an estimate of the program and technical expenses of the networks and television stations, what happened with that graph was that although when it was in black and white, that is no — we didn't use color graphics, the figures were correct. When we used color [954] graphics, we reversed the figures so what it should read at the bottom on the note would be that the index of N.C.A.A. contract price is in blue, and not as noted in the ZB-two, red, and the index of the program and technical expenses is in red, rather than in blue.

Basically, the two curves are reversed, so it is clear, it doesn't matter at all to the conclusion one draws from these

figures, because what one is concerned with is the movement of the figures and the fact that they move closely together during this period.

So it really doesn't matter which one happens to be labeled N.C.A.A. contract price per game and which one network T.V. station expenses.

Q. Doctor Landes, have you made a study of the effect of televising college football games on in-stadium football attendance? A. Yes, I have.

Q. What did you find as a result of that study? A. I think the broad conclusion would be that there is an adverse effect of television — televised college football on attendance at college football games —

Q. How did you — go ahead. A. — in the sense that when you have more games televised on a Saturday, that tends, other things the same, to reduce slightly attendance at football games.

[955] Q. Doctor Landes, how did you reach that conclusion? A. I did a detailed multiple regression analysis or econometric study involving a number of schools, approximately—I think thirty-one schools in the Oklahoma and Georgia area, including both Georgia and Oklahoma, and I examined the attendance pattern of those schools over a five-year period, from 1977 through 1981.

Q. But before I ask you how you performed your regression analysis, are what have been identified as Defendant's Exhibits ZB-nine through ZB-thirteen inclusive, the materials which describe the regression study which you performed? A. Yes.

Q. Doctor Landes, would you describe briefly for the Court, please, the documents which have been identified as Defendant's Exhibits ZB-nine through ZB-thirteen? A. ZB-nine is a list of the colleges and universities in the sample.

ZB-ten is a list of the variables used in the regression analysis, including definitions or descriptions of those variables.

ZB-eleven contains the results of regression analysis for the entire sample.

ZB-twelve contains the regression analysis for a subsample, which is those schools in division one A and one double.

And then ZB-thirteen contains the results — regression [956] results for subsample of division two and three schools.

* * *

[957] Q. Doctor Landes, in this case, how did you perform an empirical analysis of the effect of the television on the attendance at college football games? A. Well, I indicated to begin with, what the sample was. The sample being the schools in and around Georgia and Oklahoma, which gave us thirty-one schools. The unit of observation was an individual home game at one of these schools which if you look over a five-year period and thirty-one schools, you have approximately a hundred and fifty home games a year, times five, or roughly seven hundred and fifty separate observations in the sample. The problem, however, with trying to explain what effect television has on attendance is really how does — how does a researcher go about this, when you know that on virtually every day that a college football game is played, there is a college football game on being — being televised.

So it is not a straightforward obvious easy way in which [958] one tests the effect of the television. It's not, for example, as N.O.R.C. was able to do in their studies in 1952 and 1953, where you had wide variations across the country with television penetration showed some parts of the country where the fraction of the television was low and other parts of the country where it was modest, and the parts of the country where the proportion of households that had television was higher.

So the advantage of a period like that is almost of a controlled experience because you can examine attendance patterns across areas where you can distinguish the areas on the basis of the extent to which television has penetrated.

So I thought the N.O.R.C. studies in the Fifties were actually quite sophisticated and very clever, and what was done principally in the study was to look at a benchmark, 1947-48 attendance, but not just to say, "Did attendance go up after '47 and '48, or did it go down after '47 and '48?" That, in and of itself, wouldn't be particularly meaningful since there could be other factors affecting attendance during that period.

But what the N.O.R.C. study did was to divide the country up into areas in which television had penetrated at a more extensive — and compared that to areas in which — into which television had made—had lower rate of penetration, so you were able to distinguish among areas, and what was interesting was that although the aggregate attendance fell in, I think, [959] '50 to '51, compared to the earlier period, when you divided the country in this way, you found in those areas in which television had not penetrated very much, what you found, was that attendance had actually increased relative to the base, those areas in '47 and '48, were as in those areas in which television had penetrated extensively, attendance had actually fallen.

So I thought that given at the time it was done, before high-speed computers and so on, it was a rather clever way to attempt to distinguish what the effects were of television.

The problem, as you can see, with doing a study like that today is television is so wide spread in the United States, that you really can't distinguish across areas or across countries on the basis of the fraction of households, let's say, that have television, because virtually every household has a television.

So what I did was to distinguish those days in which a doubleheader was televised on which you had two college football games televised, compared to those days on which you

only had a single game televised, on the theory that — televised college football has an adverse effect on attendance what one would suspect is on a day when there was more college football televised, there would be a slightly bigger or larger adverse effect on attendance.

I think the way we have done it would probably understate [960] the effect of televised football, that if there is a game on, someone is likely to stay home, and the marginal incremental effect of having a second game on is slight.

But the way we studied it and I think the only way one can study it at this point in time is to make a distinction between days on which you have two games or a doubleheader, compared to days in which you have a single game.

What I next did was to identify variables that are likely also to influence attendance, because again, there are clearly other facts than television that are going to have an effect on attendance. You have such variables as the quality of the team, whether the game, say, is between two teams in a state because presumably that would reduce the transportation costs of attending an away game and, therefore, should increase probably the interest in attendance at a stadium; whether a game was a homecoming game or not should have an effect independent of whether the — independent of the number of games being televised; possibly where a game is a night game or day game; the weather. And in addition to that, there may be specific factors for each school in our sample due to differences in enrollment or intensity of interest in football or the size of the football stadium.

So what I did in the regression analysis was to put those variables, what I call the independent variables, they are your right-hand variables and your variables to attempt — [961] what you are using to explain variations in attendance rate in the sample that I described and, in addition, produce a variable in the analysis which would be on, whether or not on the

particular day that we are looking, the attendance for a team, whether there was two games on television or a single game on television.

What I found, I think, can be most easily described by referring to the exhibits, the first one being ZB-eleven.

And in ZB-eleven, it refers to our complete sample which is seven hundred twenty-eight observations, and if you look down, you will see a variable name called "header," and header is a variable that basically takes the value one, if there is two games on television, and zero if there is just a single game on television.

The interpretation of that coefficient is that an increase on any given day from one to two games on television has the effect of reducing an average in our sample attendance at the schools we were focusing on, by approximately four percent, because the dependent variable attendance is in logarithmic form, so that the coefficient here would be interpreted as a percentage change in attendance when you increase the number of games from two to one.

You will notice next to header is something that is called the "T-statistic." The T-statistic is a way of measuring the statistical significance of the variable in [962] question, and that is even though one estimates a coefficient, it is possible that the coefficient — the positive or negative coefficient that one observes could be due to chance because this is a statistical study, and the T-statistic of one point twenty-nine under the assumption that what we are testing is that the model says there should be a negative effect on attendance, a T-statistic of one point nine is approximately a level of significance of ten percent, which would be described as saying there is a nine in ten chance that the effect of the second game on — second televised game on attendance is negative, and there's one in ten chance that it is not significantly different than zero.

If you notice, if you went through the other variables in the equation, they seem to come out roughly the direction that one might expect; the interstate games have a positive significant effect; homecoming tends to increase attendance; a night game seems to increase attendance by approximately fourteen percent.

We also have a variable called "televised," which is not significant, and that is whether or not the particular game was televised. That is, for example, we have in our sample a number of Oklahoma games, and the televised variable would take a value one, when Oklahoma was being televised that week, and what we observed there is actually a positive effect, which indicates that when a game is televised — when a game is [963] televised, when that — let me put it another way, when a particular game is televised, attendance at that game tends to be higher.

I think that's because when a game is televised, the criterion for selecting a game to be televised would be a game that is of special interest and, therefore, would be one that would attract fans, so that televised is probably a proxy variable for the quality of the game.

We also had a number of year variables in there to hold constant the effect of years, and a set of school specific variables which are the various school variables listed, which is a way of holding constant factors that are specific to each of the schools in the sample.

If you turn to the next two tables, ZB-twelve and ZB-thirteen; ZB-twelve refers to division one and one double A; and ZB-thirteen is division two and three.

What you notice is the doubleheader variable still has a negative effect in ZB-twelve; that is, on division one and two schools, although smaller, it's only a two-percent effect, although the levels have significant drops, whereas if you turn to ZB-twelve, you will see that when we split the sample, the principal effect of televising a second game on a Saturday is to

reduce attendance at the division one and three schools. There the coefficient on doubleheader is approximately ten percent, indicating when there is a second game on a Saturday, [964] attendance drops by approximately ten percent.

Q. Doctor Landes, you testified that you had concluded that television and college football is not a relevant market and that the N.C.A.A. lacks power with respect to its televising of college football games in the relevant product market. Have you now reached — or have you in the past reached a conclusion as to the proper relevant market with respect to product in this case? A. I think it's very difficult for an economist to be precise about the exact contours of a product market because one product tends to merge and overlap with other products. But if you looked at an all-programming, all-advertiser-supported program market, it is clear, if you look at that programming market as a relevant market, the N.C.A.A.'s market share would be negligible, certainly far too low to infer any market power.

It's not clear that that advertising-supported programming market is the full and complete market that one wants to look at because advertisers also substitute outside of the television media into other media, and they advertise on radio, they sometimes advertise on — in magazines, newspapers and so on, so there are a variety of substitute media of reaching consumers.

So in one sense, it might be even broader than an all-programming or all-advertiser-supported programming market. On the other hand, there might be some advertiser-supported [965] programs on television that one would not include in the market; you might not include if certain religious programs were advertiser-supported or some other types of programs.

On the other hand, if you go in the reverse direction and limit the product market simply to all sports programming, I think that's far too narrow a product market, but even if you

were to limit the relevant market to all sports programs, our study clearly shows that the N.C.A.A.'s share of that market is again far too small, somewhere in the order of ten percent, based on just a two-month period, to infer that the N.C.A.A. has market power.

Q. Doctor Landes, do you believe that the N.C.A.A.'s package sale of broadcast network television rights to its football games and those of its members and the related television controls of the N.C.A.A. constitute a price-fixing agreement? A. No, I don't.

Q. Why not? A. Because it goes — it, in part, goes back to the question of the effect — the fact that the N.C.A.A. is selling its programming in a highly competitive market and, therefore, is unable to exercise market power to restrict output in that programming where the buyers are advertisers, it is unable to restrict output and raise price in that market. So that one wouldn't characterize it as a price-fixing agreement, [966] particularly when you have got other factors in terms of possible increases in output, in terms of in-stadium attendance, which as I have indicated, we have done a study of in-stadium attendance and found a positive — an effect of television, an adverse effect of television on in-stadium attendance.

When you put that together with the effect of — with the fact that there is a highly competitive programming market in which the N.C.A.A. sells its package, you have to conclude that you couldn't characterize this agreement as a price-fixing agreement.

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[967] *Cross Examination by Mr. Muchmore:*

Q. Doctor Landes, do I understand you to be saying that as an economist, anyway, views the question of price-fixing, [968] that we cannot have price-fixing unless we also have market power, is that correct? A. I would say that you could

have price-fixing, you could have price-fixing without market power. The effect of a price-fixing agreement without market power might be negligible.

Q. Well, then, perhaps I should have said, an economist is not concerned about price-fixing unless it is a common need by market power, so that it can have the power of restricting output and bringing about these allocative deadweight problems that you referred to? A. I think the principal objection to price-fixing is the output restriction and allocative losses, yes, that's correct.

Q. So you can have price-fixing, but it is not objectionable, at least to an economist, is that correct? A. Well, I wouldn't quite put it that way. If you had a clandestine meeting among a group of competitors, that they met in smoke-filled hotel room and agreed to fix prices and cut back output, there certainly would be no social purpose in encouraging such an arrangement. I think it's quite proper in that instance, just to call that price-fixing because the only possible purpose of such an arrangement would be to restrict output and raise price. It may turn out that, in effect, the agreement is ineffective, but the only only purpose [969] there was to restrict output and raise price.

On the other hand, if you get a case such as A.S.C.A.P., which to some people they may view that as literal price-fixing, I think one has to go beyond and characterize exactly what the agreement is; whether it has an effect as in the A.S.C.A.P. case, of actually expanding output, and I think you have the same problem here with the N.C.A.A.; you have to characterize and look at the full agreement to determine whether it has an adverse effect on output in a particular market; whether it has a beneficial effect, say, in a market such as in-stadium attendance.

Q. Doctor Landes, are you making a determination on whether or not something is price-fixing, based on whether the meeting is in secret or not, is that a determinative factor or not? A. No, that's not a determinative factor, but —

Q. I don't understand your testimony that the determinative factor is whether there is power to restrict output. A. Yes, except there are some agreements, such as the example I gave yesterday, say, where lawyers may agree to divide up the revenues to set up a law firm or a group of entertainers may agree to put on a series of programs and divide up the revenues, I would not call that price-fixing, it has no effect on output.

Q. Isn't that what I just asked you, that you don't [970] consider it price-fixing because it doesn't have an effect on output, isn't that precisely what I just asked? A. I don't consider those agreements price-fixing because they do not have an effect on output.

Q. Right. We get back to the question, aren't you saying that the determinative factor, whether something is determined by an economist as price-fixing, is whether it restricts output? A. If you define output sufficiently broad, yes.

Q. All right, sir. So even though you might have a situation in which persons would get together and fix prices in the literal sense, if there is not the market control to allow them to restrict output, an economist doesn't consider that price-fixing? A. I don't think — maybe I misinterpreted, but I don't think I was going quite that far. If the only conceivable effect of these firms getting together is to restrict output and raise price, that's when I would call that price-fixing. It's just a simple shorthand way to describe an area of activity among firms that we would like to discourage.

* * *

[972] Q. Doctor Landes, do you agree or not agree that since one cannot restrict output in a manner that will affect prices unless he has market control, and that since you do not deem it price-fixing in a sense that is objectionable to an economist unless you can so restrict output, that it follows that without market control, there will not be price-fixing, at least in the

sense that you say an economist objects to it? A. I can answer that, yes, with qualification —

Q. All right A. — that I would be happy to explain.

Q. Let's hear the qualification. A. And that is, there would be some instances where an economist would — let me try to go back.

That in certain instances, the only conceivable effect of an agreement to fix prices would be one which was adverse to consumers; that it would be an output restricting agreement [973] which would tend to produce what I call an allocative or deadweight loss.

It may be in that instance that the firms, although they do get together and agree on what they are going to do, somehow they fail because they don't anticipate that other firms are able to expand their output in a sufficiently short period of time, so that the price-fixing or cartel agreement falls apart.

I would have no trouble calling that price-fixing; what I would have trouble calling price-fixing is something like A.S.C.A.P., where one might say that in a literal sense the people had agreed, the composers and performers had agreed not to compete in the licensing of performance rights with themselves; with respect to price, but yet the way to characterize the arrangement there was that it was an output enhancing arrangement that saved transactions' costs, that increased the number of performances.

And similarly with the N.C.A.A., I wouldn't characterize what is done here as price-fixing. This is simply a program that is being sold in a market in which there are lots of programs, so it's a competitive programming market, and in addition the controls are likely to have an effect on enhancing in-stadium attendance.

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[976] Q. Haven't you been testifying and didn't you answer my question with minor reservation that there must be market control before there is price-fixing, in your opinion? A. Well, there must be market control for a price-fixing agreement to be an effective price-fixing agreement. I don't think I would have a problem calling an agreement a price-fixing agreement, if the purpose of the agreement was to restrict output and raise price.

Q. All right. That's an attempted price-fixing agreement, then, all right. But you are not going to say that it doesn't make any difference whether there's market control because the whole import of your testimony yesterday was that market control is one of the key elements in determining price-fixing, isn't that a fair statement? A. Well — but it was — the question is really whether you want to characterize. Before you even get to the stage of saying, "This is a price-fixing agreement," you have to decide whether you are going to characterize some arrangement as a price-fixing agreement.

[977] Q. And one of the first things that — and perhaps the main thing you looked at in making that determination was whether there was market control, isn't that right? A. Yes, I did.

Q. So you can't say it doesn't make any difference whether there's market control, can you? A. I don't think I said it makes no difference if there's marketing control. I think what I — the thrust of what I have been trying to say is that for some price-fixing arrangements, an economist would have no problem calling it a price-fixing agreement, if the only conceivable purpose was to restrict output and raise price.

It may turn out that it is going to be an ineffective agreement.

Q. We are back to the unsuccessful attempt to fix prices, right? A. Yes, but there's no point in encouraging — in encouraging price-fixing by not, say, penalizing an unsuccessful attempt to fix prices.

Q. Putting aside unsuccessful attempt, is it not a fair characterization of your testimony yesterday, that one of the key determinations that you have to make in determining whether you have price-fixing is whether there's market control? Wasn't that one of the main thrusts of your testimony yesterday? A. That I wouldn't — yes, yesterday, that I wouldn't [978] characterize the N.C.A.A. arrangement as price-fixing, because, in part, it has no market control.

Q. You know, of course, who I'm quoting when I ask you if your agreement with the statement that it makes no difference whether the participants possess market control? A. I — could I see what you are quoting?

Q. Well —

THE COURT: I don't think that's a fair question, why don't you show it to him.

MR. MUCHMORE: Certainly, I would be delighted to. I simply asked him if he was familiar with it.

THE COURT: He doesn't know what you are referring to, Mr. Muchmore.

MR. MUCHMORE: I'm referring to what the United States Supreme Court said in *United States of America v. McKesson and Robins-*

Q. Are you familiar with that case? A. No, I'm not familiar with that case.

Q. All right, sir.

Doctor Landes, are you willing to say or are you not willing to say what you do consider to be the relevant market that controlling football sports is part of, and I would appreciate a "yes" or "no" answer, as to whether you are or are not willing to state what you do consider to be that relevant market?

[979] A. I thought I gave the answer on the direct testimony.

Q. Well, I had the impression that you told us both yesterday and today, that it was not. Now, are you willing to say — to express an opinion as to what it is? A. I would like really to go with the statement I made at the direct testimony; that it's broader than sports advertising; that it's difficult to give a precise contour on the market; that it may be broader than all advertisers — sponsored programming, but however narrowly one is to conceive it along those grounds, the N.C.A.A.'s share is too small to warrant an inference that it has market power.

Q. Are you saying, Doctor Landes, that you are not willing to express an opinion as to what the relevant market here is? A. Well, if I had to pick out a particular relevant market, I would say it would be advertiser-supported programming.

Q. On television? A. On network television or television, yes.

Q. Despite the fact that that's substitutable for other kinds of advertising? A. I think it is, I think if you are asking me to pick out a particular market definition, the best one I can think of here, I would go with that, even though I'm going to come back, and if you ask me and qualify it and say, in some instances, it's probably broader than that because it [980] includes substitution towards other media and there might be some programs that don't really fit into this category.

But if I have to come up with a best relevant market, I'm going to say, advertiser-supported programming.

Q. Well, sir, I didn't mean to indicate that you have to do that, I simply asked you if you were willing to? A. Well, I'm willing to, subject to the qualification.

Q. All right. Now, your testimony is, then, that not even all sports constitute the relevant market on television. That is a correct statement, is it not? A. Yes.

Q. And what that means is that not even the control of all sports would entitle someone to restrict output, control prices and have an allocative or deadweight effect, is that correct? A. That's false.

Q. Your testimony then is that if one controlled all sports, one could successfully restrict output and raise prices? A. Well —

Q. And bring about this allocative deadweight effect? A. The market share — if you say that there is a broad market, say, all programming or even if you exclude some programming from that, the sports' share of that market certainly is going to be sufficiently large, the all-sports share, to warrant an inference that if all sports got together [981] they could very well restrict output and raise prices.

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[989] Q. What is the marginal cost of production of — to Oklahoma or Appalachian State of a television broadcast of a football game that they happen to be playing? A. I find it very difficult to identify what is marginal costs when we're talking about televised college football. To me, it's some ways analogous to saying what we mean by the marginal cost of a book. We would have to spend a good deal of costs to develop and write a book, and certainly books are sold at prices of ten, twenty dollars, and yet the actual additional cost of printing the book might be ten cents or twenty cents.

[990] If you had a fuller definition of marginal cost, it would tend to incorporate into the cost definition, the costs of creating and developing the book, and the same way in college football, when you look at the cost of televising college football to the teams, you have a package on the one hand that yields revenue and you have the cost of developing an attractive product for the network, and it's very hard for me to identify precisely what that cost is, because to the extent there are revenues, people are going to spend real resources to make the games more attractive, and that would be part of the marginal or incremental cost of having games televised on television.

Q. Now, when publishing a book, we publish it for the purpose of selling all those copies, including the last ones that were so cheap to produce, isn't that right? A. Yes, but you

certainly wouldn't want to sell them all at the cost of producing an additional book.

Q. I understand that, but the purpose of publishing the book is to sell all the copies? A. That's right.

Q. Now, these teams played football before we had television, didn't they? A. Yes, they did.

Q. If football and television were banned entirely next year — O.U. would go ahead and play its schedule? [991] A. Yes, although in the longer periods of time, the effects of absence of television revenues might reduce the quality of games and expenditures to promote and create a valuable product.

Q. I understand that, but — A. And those costs somehow should be attributed or allocated to the chore of getting games televised.

Q. Well, we would go ahead and play the fall schedule, television or not television, would we not? A. I assume next year, you would, yes.

Q. Isn't what you say, it's very difficult to even find a marginal cost for a college football television production? A. I think that's true, yes, it's joint cost, combined with the entire cost of producing football.

Q. If the entire cost of producing football is there, whether you are televising it or not, is it not? A. But I think that mischaracterized what I was saying before; since the part of the cost of a football game is the cost of developing an attractive product for poeple to see. And one has an incentive because of the revenues to be obtained from television to develop a more attractive package to the extent you are spending resources to develop a more attractive package, that's an additional cost to be attributable to televising college football games.

[992] Q. All of that is an elaborate way of trying to explain why we charge anything for televising these games, isn't it? A. It explains it, yes.

Q. Well, when an economist first looks at it, he says, "They don't have to pay anything for the televising of it," and their marginal cost is zero, isn't that right? A. Yes, but I think that's a very mechanical way of looking at a complicated problem.

Q. But actually you think the marginal cost for a game may be as high as a million dollars or more? A. I can't identify precisely what the marginal cost is because, as I say, it's the cost of developing a more attractive package for television, it's difficult for me to identify what that cost is.

Q. But you don't have any problem in saying that the marginal cost of televising a game or not televising it, just playing it, the cost, marginal cost, may be more than a million dollars? A. I just don't know.

Q. That would not be beyond what you consider reasonable for it to be, though? A. Well — but the way I am looking at marginal cost, I think is in a slightly different way than you are. I'm looking on the one hand, what the — a package of programs [993] like almost equivalent to something like "Laverne and Shirley," a series of programs produced which we call college football. There is a cost of developing that package, so that's an attractive package to the networks to be broadcast, and one wants to attribute to televising that package those costs that are incurred, but for the possibility of getting these football games televised.

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Q. Looking at marginal cost the way you look at it, not the way I look at it, are you saying that the marginal cost [994] of televising the Appalachian State-Citadel game; that is, the cost to those two schools, may have been as high as eight hundred eighty-four thousand dollars? A. I don't think so, I don't think I was saying that, and I don't think it's probably — I think the cost is probably lower than that for those two schools.

Q. What do we have when we have a product being sold at higher than its marginal cost? A. But you are asking a different question, and the question — you are putting it in a way differently than I'm trying to put it.

Once it's been decided that the Appalachian State game is going to be televised and the game would have been played, anyway, anyway, we can all agree, I think you and I will agree, that the cost of actually getting that game televised once the game — we know it's going to be played and so forth, is going to be zero, close to zero. Right?

But what I was asking — what I was looking at, is that there is a — there are revenues, there are prices from producing a network series of college football, and there are going to be costs attributable to the universities in the aggregate from creating a more attractive product, so they get additional and greater revenues from college football.

Q. And in the case of Appalachian State-Citadel, are you willing to assume that's reasonable, that their costs [995] in developing their product for television may have been eight hundred eighty-four thousand dollars in the broadest sense that you have used the phrase? A. Well, for that particular school, probably not, but you may have a number of schools that are competing to get on television, only one is selected, and when you aggregate up the expenditures of all of the schools that are trying to get on television to obtain that eight hundred and eighty-four thousand, that is what makes their games somewhat more attractive, it's quite possible that the cost could be in the aggregate eight hundred thousand, although I doubt it would be eight hundred thousand for the two schools.

Q. And, of course, if you can't just — you can't justify the cost, the marginal cost of that game being eight hundred eighty-four thousand dollars, then you would be looking at a price above marginal cost, wouldn't you?

A. Well, except that the price that I look at in this market is the price for the package. I mean, you're asking — again, it comes back — take series of programs —

Q. Well — A. — like "Laverne and Shirley Show," or something, which has a package of programs, there is a price for that package, and I don't know how that price is divided up among the actors on different programs, and so forth — on different episodes of this series.

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[997] Q. Excuse me, Doctor Landes, I don't think we are communicating, because there can't be a debate over the definition of marginal cost, because in my question, I said define it however you want, if marginal cost defined the way you, Doctor Landes, wanted to define it here, without debate, if that marginal cost is not two hundred sixty-three million dollars, then there's evidence of market power? A. Well — but there may be economic rents, an economist would refer to economic rents received by the N.C.A.A. But at the margin, it may be that the additional expenditures in the aggregate that are paid to make programs, college football more attractive, is just balanced off by the price that these programs are right- — that a somewhat more attractive program package is able to obtain in the market.

Q. You are refusing to accept my assumption, are you not, when I say it may be that the marginal cost is that high, my question — A. No, but —

Q. Go ahead. A. The — let me put it this way — the cost of the programmings over the next few years may be, let's say, twenty [998] million dollars, and the aggregate revenue, a hundred and thirty million dollars, so there is a hundred and ten million dollars over and above the total cost, yet at the margin, the teams in the aggregate may be spending additional dollars that just balance off at the margin, the additional price that could be obtained from this more attractive package.

That is what you would have — would be a program that receives economic rents.

I mean, you have — in the syndicated programming market, you have many programs that have already been created

on networks, and they are now in reruns, such as a program like "M.A.S.H." Everyone who has examined the syndicated programming market or network programming concludes it's a highly competitive market, that people are struggling to get their programs picked up on television.

Yet many of these programs earn revenues far in excess of the literal costs of getting the program televised because a lot of those costs have already been incurred, and yet one wouldn't say from that, that these program producers are receiving — are monopolies, it's simply they are receiving economic rent.

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[1000] Q. Of course, the advertisers, their demand is derived from the viewers? A. Basically from the viewers, with some adjustment for demographic characteristics of the viewers.

Q. And when we say to them, viewers are fungible, that goes back really to our point, that the N.C.A.A. can no more raise the price of college football television than an individual farmer can raise the price of wheat by holding back his production? A. Yes, it does.

Q. You used exactly that example in your report, did you not? A. Yes, I did.

Q. That if wheat is selling at ninety cents and one farmer says, "I'm going to hold back my wheat and sell it for a dollar," he's trying to fix prices, but it doesn't do him any good because he doesn't have market power because wheat is wheat, is that right? A. That's right.

Q. And essentially you're saying that that's the same situation we have here, the N.C.A.A. says, "We will"—even [1001] if they say, "We are going to hold back our product and televise less of it," rating points are rating points and, therefore, they cannot affect the price that they receive for it? A. If they receive per game, based on advertisers, what advertisers are willing to pay for viewers, basically they are competing in a broad—their programs are competing in a broad market with

other programs, and cannot by restricting the number of games televised, really have any influence on the price that advertisers pay.

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[1002] Q. Let me be more specific. If the N.C.A.A. were to have tendered to A.B.C. and C.B.S. a contract which is identical to the one that they have now, except that instead of having the television plan that restricted other games, they — told A.B.C. and C.B.S. — you have your pick of the games and you do it under the two rule — network ground rules, but any other game that any school wants to televise, they can sell it to KOKH T.V., to N.B.C., to whomever they wish, and all the other games that you don't want can be televised, it's your testimony that the value of that contract with A.B.C./C.B.S. would still be just as high? A. No, because I think some viewers might be diverted from the A.B.C./C.B.S. to other programs, there needn't be any aggregate significant change in the total number of viewers, when you have these additional programs televised.

But with diversion of viewers from one station to another station, there certainly is going to be a reduced value to a particular station from acquiring the program.

Q. Let me see if I understand that. A.B.C. and C.B.S. are or should be willing to pay more for the contract because [1003] of the other restrictions on the output of football games, is that right, or not?

A. Basically what A.B.C. and C.B.S. are willing to pay for college football depends on the number of viewers each station anticipates to watch the football games that the station is broadcasting, and if you have an additional station that is picking up games at the same time, then what will happen is some of the audience will be diverted from A.B.C. and C.B.S. and, therefore, the amount that A.B.C. or C.B.S. would be willing to pay for a game would be less primarily because it has

fewer viewers although maybe on a price per viewer basis, there would be no change.

Q. Let's not get into the reasons right now, may I please have an answer to my question? Are you saying that the price per game that the N.C.A.A. is receiving under the A.B.C./C.B.S. contract is enhanced by the fact that they are restricting the output of other games to other stations or not? A. I would think that the price per game, not per viewer price per game, is—

Q. That was my question.

And, therefore, it follows that the total price of the package from A.B.C. and C.B.S. is higher because the N.C.A.A. has its rules restricting the output of other games, is that correct or not?

[1004] A. If what it does by restricting the output of other games is shift viewers that would have watched those other games to A.B.C. or C.B.S., it's going to increase the number of viewers on A.B.C. and C.B.S., and if it does that, A.B.C. and C.B.S. are going to be willing to pay more because they have more viewers, and advertisers are willing to pay basically for viewers, so it would increase the program price per game.

Q. I think you are explaining why, Doctor Landes, and I have no objection to that, but first I would like an answer to what—are you not saying that the exclusive nature of these contracts, the restriction on the output of other football television games on a given Saturday afternoon does raise the price per game that A.B.C. and C.B.S. are willing to pay? A. Yes, and I say, yes, subject to the qualification that the restriction enhances the audience of A.B.C. and C.B.S.

Q. What you are saying is, yes, so long as there are viewers who watch the A.B.C./C.B.S. games that may have watched another game if it were available? A. Yes.

Q. For instance, A.B.C. and C.B.S. are broadcasting Michigan State and KOKH is showing Iowa State, so far as we assume that there are some viewers in Oklahoma that would [1005] like to watch Oklahoma and Iowa State, even restricting them from televising that game, it has enhanced the amount of money that it can receive for the Michigan—Michigan State game, is that not correct? A. Could I get that read back? It was a rather long, lengthy question.

MR. MUCHMORE: Let's all listen to it again, then.

(THEREUPON, the record was read back by the reporter.)

A. Assuming, yes, to the extent that those viewers who would have been watching Iowa and Oklahoma State are diverted to the network viewers —

Q. Excuse me, that was the assumption of the question, that there were such key viewers. A. Yes.

Q. That being the assumption in the question, the answer to the question is, yes? A. Yes.

Q. And the reason that that price can be so enhanced is it not because Oklahoma, Iowa State, Michigan State and all the others are members of the N.C.A.A. and follow its rules as to what games can be televised and what games cannot? A. Yes.

Q. In other words, they have combined together these competitors and agreed to restrict the output, is that not right? [1006] A. They have combined to restrict the number of games that are on television. Now, as I have indicated in my direct testimony, I didn't view football as a distinct product market, that they weren't able to affect output in a relevant market, which is the price that advertisers are willing to pay for programs.

Q. But your conclusion that they can't restrict output was because they couldn't affect prices, wasn't it? A. Yes, but the question is what prices are we talking about, and I'm not

talking about the price of a program, but I'm talking about the price of an advertising minute on a program—

Q. I see. A. —adjusted for a number of years.

Q. The N.C.A.A. can affect the price of what they get for a football package by restricting their output, but that's not relevant to the economist, is that what you are saying? A. It's basically a transfer between the station, in this instance, and colleges.

Q. Well, sir, the N.C.A.A. can affect the price they get for their total football package? A. Yes.

Q. By restricting the output of other televised football games? [1007] A. Oh, I assume if they were to restrict the output of their programming package, yes, they will get more for the total program.

Q. But to an economist, anyway, that is not the relevant question? A. But you have to make an adjustment for viewers.

Q. All right, sir.

Now, in comparing our football games to grains of wheat, Doctor Landes, you are making the assumption that advertisers view rating points as rating points with the qualification that the demographics may have been different? A. Yes.

Q. And that the advertiser does not care what time of the year or what time of the week the game — he is advertising? A. I certainly said that advertisers can substitute across different time periods, different games, yes.

Q. What you said was it makes no more difference to an advertiser whether his advertising is on a Saturday or Tuesday, than to a car buyer, whether he buys a car on Saturday or Tuesday? A. Because of the ease of substitution across different time periods.

Q. And as an expert on broadcasting, are you saying truly, then, that advertisers do not make an effort to advertise [1008] on particular days of the week or to spread their advertising

over all the days of the week, are you telling the Court that? A. I'm saying that advertisers are interested in reaching viewers.

Q. That was not the question, Doctor Landes. A. But what advertisers are interested in is reaching viewers, and it doesn't matter whether you reached the viewers on Friday night or Saturday night or Saturday afternoon, or Wednesday night.

Q. It matters if he is not watching on Friday night, but he is watching on Saturday afternoon? A. Certainly what you are interested in is reaching viewers, you have made my point.

Q. And if there are viewers—and if there are viewers who will watch football on Saturday afternoon, but don't watch prime time on the week night, then it makes a difference to the advertiser, doesn't it? A. Based on the empirical analysis I did, looking at the advertisers that advertised on N.C.A.A. football, they seem to be widely distributed across all sorts of programming times.

Q. Would you answer the question? If there are advertisers who watch N.C.A.A. on Saturday— A. No viewers?

Q. — viewers who are unlikely to be watching prime [1009] time television, then the advertiser might have a special interest in Saturday afternoon, might he not? A. If you could only reach that set of viewers by advertising on Saturday afternoon, and it was critical to sell your product to reach those set of viewers, then the advertiser might have a special reason to advertise on Saturday afternoon.

Q. If you could only reach them, or would it be enough if you could more likely reach them on Saturday afternoon? A. But your hypothetical, I thought, was that these people did not watch television, except on Saturday afternoon?

Q. They were less likely than others to watch television, except on Saturday afternoon, under those circumstances, wouldn't the broadcaster have a special interest in Saturday afternoon? A. Yes, but subject, again to the qualification that

the advertiser has to market his product, as I understand it, essentially to advertise to this set of customers that are more likely to watch on Saturday afternoon.

Q. And if there is a set of customers who are more likely to buy cars or buy beer or buy computers or buy insurance, and if they are more likely to be watching on Saturday afternoon, then Saturday afternoon becomes special to the advertisers, doesn't it? A. To some advertisers, right.

Q. To some advertisers? [1010] A. To some advertisers, certainly.

Q. And as a matter of fact, if a — if a supplier of programs can significantly expand the total television audience for a certain period of time, then they have market power, don't they? A. Could —

Q. Well — A. that —

Q. In short, a program supplier can exercise market power only if its program significantly expands or improves the demographic characteristcs sought by advertisers of the total television audience? A. Yes.

Q. You agree with that? A. Yes, I probably said it.

Q. Well, we know you did, it's in your report, isn't it? A. Yes.

Q. And would you agree or not agree that it is quite possible, likely, that the number of viewers on Saturday afternoon may be expanded to total number of viewers by the fact that there is an N.C.A.A. football game on? A. It's possible, that the number on Saturday afternoon, although I — I did look at some data on that across three markets, Chicago, Los Angeles and New York.

[1011] Q. On Saturday afternoon? A. On Saturday afternoon. Again, you have a problem here because there's a game on on every Saturday afternoon. And what I did was look at the

double header to ask whether the double header as a second game, so I looked at a time period which the second game was on in New York, a second game that was on in Chicago, and a second game on in Los Angeles and what I found was that although A.B.C.'s share during this hour tended—A.B.C.'s share of the audience, A.B.C.'s share of households watching television tended to increase when there was a second game on, on average on these three markets, there was no increment in total viewers in the three markets, suggesting that basically what a double header was doing or a second game was diverting viewers from one program to another without significantly expanding audiences on Saturday afternoon.

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[1012] Q. Looking at the demographics which you said can also give some market power, would you agree that the demographics of who's watching television in Oklahoma City on Saturday afternoon, are different according to whether there's a football game on or whether they have to choose between "Bullwinkle" reruns and old movies and that type of programming? A. Yes.

* * *

[1013] MR. MUCHMORE: Maybe we ought to be more specific.

Q. What page is that in your report? A. Excuse me, page thirty-eight.

Q. I know — I understand that you say it is part [1014] of the study, let me ask you specifically, do the results on this table three, on page thirty-eight, do those form one of the bases for the opinion, in you mind, that you have expressed in this Court or not? A. One, but I don't consider this a very powerful study.

Q. All right, sir. A. And I indicated so in the report.

Q. But it is one of the things that you have take into account? A. On page thirty-seven, I have an extensive footnote explaining why that is so.

Q. Just very briefly, without going into all the numbers of it, what you are saying—is it not fair to say that what you are saying is that if they have market power, then when the total number of advertising minutes was increased, we would have expected the price to be received by each to decrease? A. That's an implication of a downward sloping demand curve.

Q. Yes. A. And what I said about this table was that I didn't see any evidence of a downward sloping demand curve, and I think I indicated clearly in the footnote that other factors can affect what is happening to price and made an effort to

make some adjustment there by putting it on a deflated basis; [1015] that other factors can affect price and the results here are only indicative or suggestive that there is no negative relationship between price and quantity, as I defined those terms.

Q. All right, sir. Incidentally, the general trend, since, say, 1968 to 1970, has been downward, hasn't it? A. Yes, but they are—if you start in 1960, and you go for the entire period, you see roughly a doubling in advertising minutes and an increase in price of around fifty percent in real terms.

Q. Yes, sir. But the answer to my question, looking at the last ten years, that general trend has been down; the answer to that question is, yes, is it not? A. Yes, if you read that from the table.

Q. Yes, sir.

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[1016] Q. Doctor Landes, let's try very briefly to look at this table three and what it shows, and what your calculations to it are.

What you are saying is nothing more nor less than if the N.C.A.A. had market power, as you have defined it, with college television football, then as over the course of the years if they increased their output, that is the total number of advertising minutes you would expect, since they had market power; that as the output increased, that the price in constant dollars, anyway, would go down? A. Yes, subject to the qualifications that are in the report.

Q. Or to put it another way, all things being equal, you would expect the price to go down? A. Yes, that's what I said in the report.

Q. And all things, of course, as you said in the report, are hardly equal from 1960 to 1981? A. That's what I said in the report.

Q. And as you indicated in the report, inflation could prevent those prices from going down, and did? A. But that's taken into account by column three.

Q. Another thing which could affect whether the price went down or not would be whether the number of television [1017] viewers increased over that period of time, is that not correct? A. Yes, that's true.

Q. Or whether the Gross National Product went up, or the advertising budget of the advertisers increased, all of those things would tend to prevent the price from going down, wouldn't they? A. Yes, or could. I mean, I don't know, but there's—one could have a hypothesis that they would.

Q. And that if the production of college football improved over the twenty years from '60 to'80, with color television, more cameras, instant replay, that is another factor which could enhance the popularity of the sport and could prevent the price from going down? A. Yes.

Q. And if college football or sports generally got more popular over that twenty-year period, so that more people liked to watch it on television, that's another factor that could prevent the price from going down? A. Yes.

Q. So those are the reasons, then, that you have qualified the importance that you put on that study, are they not? A. That's right.

Q. The second study is the one where you state on page thirty-nine, "We are trying to determine now whether [1018] college football television and all other programs, "Laverne and Shirley," "M-A-S-H," are in the same product market? A. Yes.

Q. "And we say if two products are in the same product market, their prices will tend to move together"? A. It's right in the report.

Q. Is the converse of that necessarily true? A. The converse being?

Q. If two product prices tend to move together, then they are in the same product market? A. No, I wouldn't say that.

Q. As a matter of fact, the prices of a lot of things might tend to move together, that wouldn't be in the same product market? A. Yes, sure. That's well-recognized. This is not if you lack a sufficient condition for determining the two products are in the same product market, but it's a test that is suggested to be used as one factor in determining if products are in the same product market, you would expect to find their prices moving together.

Q. What you say here actually is that the results of this test are consistent with their being in the same product market? A. That's right.

Q. In other words, this was a test that could have [1019] proved that they were not, but is not sufficient in itself to prove that they are? A. That's correct.

Q. We are going to need more than this test to determine whether they are in the same product market, aren't we, sir? A. Yes, although the cumulative effect of a number of tests, each one, in and of itself, not sufficient, may be very great.

Q. Well, of course, that power should not have the cumulative effect of that test, is not very great, is it? A. This is a test that is widely used in—among economists when they are discussing the question of whether products are in the same product market, or given products—given product that is sold in two different geographic areas, are in the same given market or not.

Q. All right. Let's look at it. Figure seven is now exhibit now exhibit what? A. ZB-three.

Q. ZB-three? A. Yes.

Q. Let's look at ZB-three. What is your index year there? A. The index year?

Q. Yes, sir. [1020] A. It takes the value one.

Q. What year is that? A. I believe it's '70-71, but the Consumer Price Index is '70-71.

Q. Between '70-71, for example, and '76-77, what happened to the contract price per game of N.C.A.A. football? A. Well, during that period it was not rising as rapidly as the rate of inflation.

Q. We are looking at the deflated one? A. Yes, that's what I said, is not rising as rapidly as the rate of inflation, so that in real terms, it was falling through the period.

Q. In real terms it looks like it declined, twelve, thirteen percent, doesn't it? A. Yes.

Q. Down thirteen percent over that period of time? A. Yes.

Q. Now, what happened to the index of network and T.V. station program and technical expenses during that period of time? A. For one year it went up, and one year it went down, and the next year it went up.

Q. Between '70 and '78, what happened to it? A. Between '70 and '78?

Q. Yes, sir. [1021] A. It went up.

Q. How much? A. I don't know. Roughly twenty-six percent or so, in real terms, thirty percent.

Is that your reading?—from approximately one, to—I don't know, one point three, or one point three five, something like that.

Q. Well, if we look at '76-77, which is what I think I said, it's up maybe—seventeen or eighteen percent, isn't it? A. Well, we—why don't you give me the years again?

Q. All right, '70 to '76-77. A. Yes. I thought you said '78-79.

Q. Well, I'm sorry, because the number I gave you on the other side appears to be from '76-77. In any event, when these two figures which are moving together, you have one of them

up eighteen percent during that period of time, and the other down thirteen percent, don't you? A. Yes, you do, although I don't think it's fair to pick out any particular period if you want to look at the entire pattern of real prices. And you can see that the two series move closely together. In fact, they split the statistical measure of the series indicating a very strong positive correlation between the two.

Q. Sure, they moved positively, just like the prices [1022] of all food in the last twenty years have probably shown a positive correlation. A. I don't know that to be true, once you adjust for the Consumer Price Index.

Q. You wouldn't expect that to be true? A. Some types—certain food has moved more rapidly than the Consumer Price Index. Others have moved less rapidly. So I suspect if you looked at different types of food products, you would find wide variations. And I would expect for those that are roughly comparable in terms of being in the same product market, you would see some pattern like this; and those that weren't, you wouldn't see a pattern like this.

Q. Over that period of time, in any event, they differed by more than thirty percent, didn't they, in real dollars? A. Yes. I mean, I can read that chart.

Q. And it reads more than thirty percent difference? A. For that select period, yes, sir.

Q. And during that period of time when the output of college football television minutes was increasing, the real price per game was decreasing, wasn't it? A. During that period we saw that, for example, when we went to the earlier chart.

Q. Yes, sir. And which is what one would expect to [1023] find if one had market power? A. Yes, but again, I think you want to look at the entire period. And when you look at the entire period in the earlier table, you don't see that pattern.

You pick out any particular, you know, series of years, two years or three years or four years, you may see a relationship, inverse relationship between price and quantity. But if you take a broader view—a broader period and look over the entire period there, you don't see that relationship.

Q. What you mean is if you go back onto the Sixties, you may find a different situation than what I have been talking about in the Seventies, right? A. Yes.

Q. And that's what you would prefer to do? A. I would prefer to use all the information that's available to me, rather than be selective and use information from just the last few years.

Q. Now, sir, the final basis on which you have based your own conclusion that these things are not in the same relative market, has to do with this products advertised question, does it not? A. Yes.

Q. And what you say there is, well—see if you agree that this is a fair statement: there are circumstances like the diabetic who must have a diet soft drink; there are [1024(a)] circumstances where someone has a need for a specialized input, must have it? A. Or essential input, I called it.

Q. All right. Specialized need for a special input. There are such circumstances? A. Yes.

Q. And where you have a circumstance like that, then you may—not "must" but "may"—have a relevant product market? A. Yes, subject to important qualifications that I went through in the paper.

Q. That's why I said "may," not "must." But the converse of that isn't true either, is it?

All right, we will state the converse.

It is true that where you have an advertiser—where you have a buyer with an essential product, that may mean relevant

market, but it certainly doesn't follow that the only time you have a relevant market is where you have an advertiser with a specialized need, does it? A. I am going to write this out so I make sure I understand it exactly.

Q. Are you saying—A. Well—

Q. Are you saying that the only time we have a relevant market is where we have an advertiser with an essential input? [1024(b)] A. No, I don't think I am saying that at all.

Q. Of course not. That would be only a tiny fraction of all the circumstances where you would have a relevant market wouldn't it? A. Yes, it would be.

Q. And all you are saying in this point three is that this isn't one of those special circumstances where there's an essential input? Isn't that all that three says? A. What I am saying—what three shows to me, in a very powerful way, is that there are many substitute programs for advertisers who advertise on N.C.A.A. college football, or wish to advertise. And to the extent that advertisers or the products have substitutes available to market their product, those substitutes should be included in a relevant market.

It's one of the sort of basic applications I discussed in defining a market where you would want to include products that are good substitutes in demand. And here what we observe is that the advertisers selected for the N.C.A.A., that's the basis of selection for this sample, are advertisers where the vast majority of their commercial spots are on non-N.C.A.A. programming.

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[1026] Q. But from the fact that we don't have that particular special circumstance, that, alone, doesn't show that they are not in the same relevant market, does it? A. No, but what we do have here, we have advertisers who can—

Q. Yes, sir. A. —reach a wide variety of viewers on many programs, suggesting that these advertisers that advertise on N.C.A.A. football have available to them numerous substitute programs on which to advertise. That's an important index in terms of defining a relevant market.

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[1027] Q. My question is that we say some kind of relevant markets are in this specialist demand area? A. Yes, you could have a relevant market when you have a lot of specialized consumers, but then you have to ask why is that? That's because they can't substitute away, and that's the point I have been trying to drive at here for the last few minutes, that what we have with this data are advertisers that seem to be able to substitute away from sports programming, as evidenced by the fact that they advertise on a wide variety of programs.

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[1028] Q. All right. People who advertise on N.C.A.A. football do a lot more advertising somewhere else? A. Yes, that's true.

Q. And from that, you infer that they don't need to advertise, or especially want to advertise, on N.C.A.A. football, is that right? A. It would be inconceivable to me that in order to market their product on such a small fraction in the aggregate of their spots, or in N.C.A.A. football, that in order to market their product that N.C.A.A. football is some essential ingredient to marketing and selling their product.

Q. Going from the question whether it's essential, do you also infer from the fact that they spend most of their money elsewhere, buy most of their time elsewhere, that what they spend elsewhere is freely substitutable for what they spend on N.C.A.A. football? A. Basically, they are interested in reaching viewers, and they reach their viewers by advertising on a wide variety of programs. That's—I suggest they can substitute a wide variety of programs to reach their viewers.

Q. Okay. The fact that they spend most of their money not on N.C.A.A. football suggests that other than N.C.A.A. [1029] football is substitutable for N.C.A.A. football? A. That there are sufficient number of viewers available to them on non-N.C.A.A. football, that they can reach those viewers by advertising on those programs, whether they are sports programming or nonsports.

Q. So the fact that they spend very little money on N.C.A.A. football means that they would just as soon spend none and substitute the other programming entirely for N.C.A.A. football? Is that what you are saying? A. I didn't say "none." I presume that an advertiser selects a package of ads to reach viewers, and this particular package that the advertiser selects is probably the optimal package in terms of reaching viewers. But in response to an attempt, say, by the N.C.A.A. indirectly through limiting the number of games to raise the price to advertisers, they are going to substitute away to some of these other programs, because the viewers are basically viewers, they are fungible to advertisers.

Q. But what you are saying is that the advertisers will freely substitute—that is, spend the rest of their money—on other programming? A. They don't have to spend the rest of their money, they have to be able to shift across program types to include them in the same market.

Q. And the fact that they spend very little of their [1030] money on N.C.A.A. football shows, in itself, that they are willing to substitute other programming for what money they do spend on N.C.A.A. football? Is that what you are saying? A. I can repeat again what I am saying. It shows they have numerous other programs on which to advertise and reach viewers, and, therefore, if N.C.A.A. tried to restrict output and indirectly raised the price to advertisers who are advertising on N.C.A.A. football, these advertisers do not appear sufficiently specialized to N.C.A.A. football, for the N.C.A.A. to exercise market power.

These advertisers advertise on a wide variety of programs and varying demographic characteristics, and that is suggesting to me they should all be included in the same market.

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[1034] Q. Now, on this study which is—let's see, what is the exhibit number for your regression analysis study? A. We are now talking about the attendance study?

Q. Pardon me? A. Attendance?

Q. Yes. A. It starts ZB-nine, which identifies the list of colleges.

• • •

Q. Now, what these—let's be real clear on what these tests show and do not.

What these tests show, and only what they show, is that for schools with a specified distance of Oklahoma and Georgia—A. Including Georgia and Oklahoma.

Q. Well, they would be within that distance—there is a probability, high probability, if you wish, that on days when the N.C.A.A. shows a doubleheader, the attendance is less than on days when the N.C.A.A. shows only a single game? A. That's correct.

Q. And that's all it shows? A. Other things the same, yes.

• • •

[1043] Q. Now, this also tends to show, although you have said it's not statistically significant, but it tends to show that having a game televised causes that game to have more people attending it, doesn't it? A. Yes. The precise coefficient here is approximately four percent, that when a particular game is being televised, the attendance at that game is four percent. And I think there's a very simple explanation for that, is that

the games that tend to be televised are the better quality games, the ones that attract more fan interest in general. So that variable is really standing for a measure of the quality of the game.

[1044] If you notice, if you turn to table ZB-thirteen, there is no televised game in that sample, because none of the division two and three schools at that time, for this sample, were ever televised.

Q. What you are saying is the fact that this number is plus, does not mean that televising the game caused the increase in attendance? A. I think it's standing for another variable. It's standing for a quality variable, which we have only imperfect measures, say, of the quality of the game. This is another quality variable measure.

Q. Well, quality—what you are saying is that it does not show that televising the game caused an increase in attendance? A. No. What they show is—

Q. Is that a correct statement? A. What this shows is that televising a game does not cause a reduction in that game's attendance. But televising that game causes a reduction in everybody else's attendance.

Q. Let's stay with what it shows on the game. A. That's what the regression analysis shows.

Q. Yes, sir, but what you are saying is that although when games are televised they tend to have more people at them, that doesn't necessarily demonstrate that it is because [1045] they are televised that they had more people? A. Yes.

Q. Isn't that a fair statement? A. Yes, I said, I believe, that television is a good proxy for the quality of that game.

Q. What you are saying is both the increased attendance and the television tend to be caused by the same outside factor; that is, that it's a good game? A. Or putting it another way, you can view television as a proxy for the quality of the game. It's a common thing done in academic studies by economists to use proxy variables.

Q. What you are saying is that the two go together, but that doesn't necessarily mean that one causes the other, right? A. Because—I have an interpretation of a game that's been televised, when a game is being picked up and televised by the networks, that game is a better quality game, and, therefore, I would expect to find an increase in attendance for that game. And that's precisely what I find.

Q. That because the two go together doesn't necessarily mean that one causes the other; will you accept that? A. Yes.

Q. And that could also be true with your doubleheaders and outside attendance, couldn't it? Just because doubleheaders go together with lesser attendance, does not [1046] necessarily prove that it causes it, does it? A. But that's true in any statistical study. I mean, if you want—

Q. Including this one? A. If you want to restrict statistics, if you want to, you know, just speculate on what the effects are on attendance, that's fine. I tried to go a step beyond that by doing a statistical study. No statistical study definitely shows that "A" causes "B."

Q. If doubleheaders were extended to play in the latter part, and that had something to do with attendance, you would have an outside variable? A. That would be a possibility.

Q. Did you examine whether doubleheaders are played more in November than October? A. I don't recall. I don't think so.

Q. And if they were—did you examine whether the weather, even though it might not be below—your forty-degree weather might not be as advantageous for attendance? Did you look at that? A. Well, we tried to look at weather when we had data on weather.

Q. Only below forty? A dummy variable above forty or below forty? A. Yes.

[1047] Q. Would attendance be the same at forty degrees and seventy-five, or do you have an opinion on that? A. Would you just restate that?

Q. Would you anticipate the attendance at a given game, all things being equal, if the temperature is forty-one and cloudy, or seventy-five and sunny, or would you have an opinion on that? A. I would expect the attendance to be higher when the game is — when it's played when it's sunny weather.

Q. So a possible explanation for your chart would be that the weather is marginally worse in November, although not below forty degrees necessarily, and that more doubleheaders are also played in November? That would be possible? A. It's possible. Again, though, if you go to the division one schools where you do find a smaller effect, you have included variables for, you know, rain, hot and cold.

Q. Well, "cold" meaning below forty degrees? A. Yes. And you can always make a criticism of any empirical studies that some variables are left out. The critical consideration has to be to what extent the variables left out are systematically related to the variables that are included.

* * *

[1051] **WILES HALLOCK**

was called as a witness by the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Harry:

Q. Please state your name and address, sir. A. My name is Wiles Hallock. My address is 1333 Corte Madera, in Walnut Creek, California.

Q. And what is your occupation? A. I am the executive director of the Pacific Ten Conference.

[1052] Q. And briefly, what does that constitute? A. Pacific Ten Conference is an organization, non-profit, educational organization consisting of ten universities on the west coast, plus the two major universities from Arizona, University of Arizona and Arizona State University.

Q. It includes universities such as Southern Cal, and U.C.L.A., and Washington, and the like? A. Stanford, Cal, Oregon, Oregon State.

Q. Thank you. Now, how long have you held that position, Mr. Hallock? A. I am completing my eleventh year this month.

* * *

[1053] Q. Now, Mr. Hallock, what position in the N.C.A.A. do you now hold? A. I am the chair of the N.C.A.A. Football Television Committee.

Q. Had you been on that T.V. committee some previous time, much earlier? A. I was on the television committee in my present term starting in July of 1979. Previously, when I was commissioner of the Western Athletic Conference, I served for about a year-and-a-half, during the period back in '69 and '70.

Q. And when did you become chairman of the N.C.A.A. T.V. committee? A. I became chairman of the N.C.A.A. Television Committee in September, 1980.

* * *

[1061] Q. Now, when it came time that the nightly T.V. contract with A.B.C. for the period 1978 through 1981 was running its course, what then became the responsibility of the committee? A. Responsibility of the committee then becomes one of formulating a new television plan or principles for a new television plan, which will take effect with the expiration of the current contract.

Q. And did you, in fact, begin that activity in the early part of 1981? A. Yes, we did, January.

Q. What, in general, did you do? A. The first act which was taken was to send a questionnaire, a broad questionnaire relative to the membership's feelings about the present plan, whether it was satisfactory, what changes ought to be made in any new plan, any new set of principles which were to be formulated by the committee and submitted to the membership.

Q. Now, that was sent to all the members? A. Yes.

Q. Now, what happens to the responses when they come back? A. Responses are elevated, tabulated.

Q. Who does that? A. The staff of the N.C.A.A. does that. The television [1062] committee, itself, has the opportunity to look at the questionnaires, to divide them up at a face-to-face meeting, and to seek to draw conclusions from them.

Q. And do they read them by their districts, these geographical things we mentioned? A. Yes, pretty much.

Q. Now, after that process, what happens next? A. Because of the great interest in the upcoming television plan, the principles which were to be voted on by the membership, the committee decided not only to go by the results of the questionnaire, but to hold hearings and give any member or any conference who wished to come before the committee to make recommendations relative to the formulation of the principles, to do so.

Q. Were such hearings held in Kansas City? A. Yes, they were.

Q. Approximately when? A. Approximately February five and six.

Q. Of 1981? A. Of 1981.

Q. And what happened? A. We had a broad participation in those hearings. Virtually every one A and one double A

conference was represented in some way. The College Football Association was represented as an entity. There were individuals who [1063] came and wished to speak to the committee, as well, but mainly conferences.

Q. Do you remember who appeared for C.F.A.? A. The C.F.A. delegation consisted of four or five, or maybe six members, chaired by Mr. Scott, of Alabama, including Charles Ninas, an executive director of football, Ed Czekaj, from Penn State University.

Q. You don't have to give them all, thank you.

Did each of these members come in and give his views on the forthcoming, upcoming television plan and contract that was being developed? A. Yes, they did. Each conference representative and each representative within the C.F.A. delegation did.

Q. Now, what did the committee—excuse me, Mr. Hallock, I need to ask another question.

During these meetings with the representatives and members in Kansas City early in February, did any of the people who came before your committee state that they wanted no controls whatever on football television? A. No.

* * *

[1064] Q. What did they express generally in terms of their attitude toward television football controls by N.C.A.A.?

* * *

A. There were no statements to the committee relative to—relative to putting aside the control of television by N.C.A.A. All of the suggestions made were relative to principles of the forthcoming plan.

Q. In terms of the types and kinds of controls there should be? A. Yes.

Q. And did that deal with matters like the number of appearances? A. It did.

Q. Any others that you remember? A. I think the television committee was—was impressed with the fact that general satisfaction was expressed with the present plan. There was less—less request for relaxation of the appearance rules than we might have expected, which was also true in the survey.

There was considerable interest expressed in going to the two-network approach. There was interest expressed insofar as possible relaxation of the exception telecast rules to [1065] permit greater flexibility on the part of the institutions; that would be the only thing that dealt with control, whatsoever.

And there was considerable opinion expressed for greater regionalization, more regional games, more realistic regionalization of the games.

On the part of the one double A people, there was definitely expressed the desire to continue the restrictions on exception telecasts. The one double A conferences were quite concerned about the effect that television might have on their attendance.

Q. Mr. Hallock, after these hearings in Kansas City early in February, what did the committee do next? A. The committee then held a two-day session, inviting the networks, both over-the-air networks and the cable and subscription entities to come before the entity and bring us up-to-date on what they felt should be included in the principles of a new plan. And this session, we felt, was very productive.

Q. Now, who generally, without going into each one, came before you in that case? A. The three major networks, A.B.C. and C.B.S. and N.B.C. all appeared. E.S.P.N., probably the best-known cable network at that time. U.S.A. Cable Network; On T.V.; there were—which is a subscription television network. And at [1066] least one other subscription T.V. entity.

Q. And were these media making presentations of what they would like to see the N.C.A.A. do in the upcoming television program? A. Yes, they were. Both specifically and in a general way attempting to predict what was happening in the state of the art in television, and what the committee should be alerted to.

Q. Those were more of an exchange of views; they weren't negotiations? A. No, they were not negotiations. The major networks, of course, all expressed interest in—in the series.

A.B.C., understandably, was not as delighted about a two-network approach as were C.B.S. and N.B.C.

Q. Why was that? A. I think A.B.C. felt that the exclusivity of the one-network situation, which they had—they had telecast since 1966, was one that they wanted to preserve, and any loss of that exclusivity, they felt, was not in their best interests.

Q. What did the other networks do? A. They felt the other way, they both wanted a piece of the action, so to speak.

* * *

[1067] Did the committee, in considering the T.V. plan, or [1068] "principles," as you called them, for this year, have before it knowledge about a T.V. plan that had been developed by the C.F.A.? A. Yes, the committee did.

Q. Tell the Court about that, please. A. The committee had the C.F.A. television plan, and at its meeting in Philadelphia, went over in great detail, paragraph-by-paragraph, the C.F.A. plan for input relative to what it might — what the committee might do in the development of the N.C.A.A. principles.

Q. Now, what happened next? A. The principles were, as I said, finalized, and at that point, the next step was to send the principles to the membership-at-large for a vote.

Q. That was done on a mail referendum? A. Mail referendum, yes.

Q. What was the result of that? A. The result of that was overwhelming support of the principles for a new plan. I think the vote was two hundred and twenty in favor, and six against, and something like twenty-four abstentions.

Q. And had the principles been approved by the N.C.A.A. council before they were sent out for the mail referendum? A. Yes. I should have mentioned that they have to be approved by the council.

[1069] Q. Now, would you tell the Court, in effect, what the function of these principles are in connection with your work, once they are adopted? A. Once the principles are adopted, the committee is held responsible for negotiating a contract in conformance with the principles stated. It may not vary a great deal from the principles. In fact, any variance from the principles that it gets involved with in negotiating a contract, has to go back either to the council or to the membership for approval

* * *

[1093] Q. And do you believe that, that if the controls were lost, that the amount you could get for rights fees, such as A.B.C. and C.B.S. would go down? A. Yes, I do believe that, because they would be competing college football on other channels which would dilute the exclusivity of the network telecast as they occur on the N.C.A.A. programming.

Q. And they are willing to pay extra for that exclusivity? A. Yes, they are.

Q. And just as they are willing to pay still more, exclusivity extends four years instead of two? A. That's correct.

Q. And that is, in fact, the principal reason that A.B.C. wanted that longer exclusivity, that you negotiated a four-year

contract after the committee had earlier taken the position that two years would be more appropriate? A. Yes, I think all they wanted was to hold on to their properties packages that they feel valuable to them for as long as possible in light of what is happening in the world of cable.

Q. And they are willing to pay extras in order to [1094] hang on a little longer? A. I think that's correct.

Q. Do you agree with what you said a little earlier, I think you said Mr. Byers said if the N.C.A.A. contract with A.B.C. and C.B.S. is not the conditions under which we all operate, that there is tantamount to elimination of controls? A. Yes, if anyone within the N.C.A.A. is permitted to make his own football television deal, willy-nilly, then the N.C.A.A. has lost control.

Q. What if the N.C.A.A. makes rules, controls if you will, that tell the school how often and when it can be on television, but tells that school that they can contract with any network they want for any price they want, wouldn't we still have controls there? A. You would have — I suppose you would have a measure of control.

Q. Wouldn't that be a practical way to both, authorize the amount of football television there was and give the schools their freedom of choice of who to contract with? A. I don't know whether it would be or not.

* * *

[1100] Q. Now, how did it come to pass that the dollar amount of the A.B.C. and C.B.S. contracts were identical? A. I'm trying to search my memory for the — originally, the A.B.C. bid contained in it what A.B.C. chose to call as a favored nations clause, and in that clause, it was agreed to, and the N.C.A.A. agreed that if the price that was offered by the second network was less than A.B.C. offered — this is general terminology — less than A.B.C. offered, that — that A.B.C. would have the — would have some option to reduce its price. But if it were more than A.B.C. offered, then A.B.C. would have to match it.

[1101] Q. Did — A. One of those or the other occurred. And C.B.S. offered, as it turned out, slightly more than the A.B.C. offer, and A.B.C. then was required to meet it.

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[3] **(EXHIBIT 131-D)**

DEPOSITION OF WILES HALLOCK, DEPOSED NOVEMBER 11, 1981.

WILES HALLOCK,

a Witness, of lawful age, being produced, sworn and examined on behalf of the Plaintiffs, deposeth and saith:

Direct Examination by Mr. Muchmore:

* * *

[50] Q. During the negotiations with ABC, CBS and NBC between the middle of June and the 29th of July, what discussions were there as to the amounts to be paid for individual national and regional football games in any of the four zones being negotiated? A. Between what dates?

Q. During the negotiations from mid-June to late-July, '81. I understand there were overall totals of money that were discussed? A. Correct.

Q. But I want to direct you to what discussions there were about amounts to be paid for individual national and regional games. A. There was no discussion on that subject except the realization on the part of the Committee that it was possible with a two-network approach, two-network contract, that the networks might be paying different amounts for respective games. That is the only discussion we had.

Q. Well, would you amplify that? Who was that discussion with? [51] A. Well, that was just within the Committee. We understood that, and have always understood that the network has the right to set the prices and that we recognize that we are in a different ballgame with two networks than we were with one from the standpoint of the possibility of differing rights fees and even differing rights fees for a particular game or as an incentive perhaps to move particular games.

Q. So, you are saying, then, that the Committee had internal discussion that somebody might make more money appearing on one network than another network? A. Yes. If the rights fees were different, that could very well happen, and we had previously discussed the viability of an incentive because of ABC's talking to us in terms of how difficult it was to get teams to move into special dates and so on.

Q. And the question was ABC wanted you to approve being able to offer more money to a team who would move a game? A. It really was not resolved. It was just discussed as a possibility. As I remember, ABC was not sure that that would make that much difference as an incentive. There were teams that would not move for any kind of incentive, and it might make a difference with some, but I don't think there was any conviction that this would solve the problem.

Q. But did ABC indicate they might want to make that request of you? [52] A. They don't have to request that. I mean, if they decide they want to do that, they can do that.

Q. There was no discussion at all with ABC or CBS, then, as to what the amount to be paid for individual games would be? A. No.

Q. Has there been any discussion of that since? A. No.

Q. Do you know now what an individual game will be worth on either ABC or CBS next year? A. No.

* * *

[70] Q. Have you given any consideration since you have been on the Football Television Committee to accomplishing or otherwise seeing to it that there are done any studies which would directly ascertain what the effect of football television is on live attendance? A. Since I have been on the Committee, there have been no studies entered into by the NCAA on that subject. You hear, you know, individual reports from people from time to time relative to what effect it has. In my own experience in the Pac Ten, I do know that television of a game in Los Angeles certainly affects very substantially the attendance at the Los Angeles Colosseum.

* * *

[1130] **CHARLES SCOTT**

was called as a witness by the defendan, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Harry:

Q. Mr. Scott, would you please state your name and address? A. My name is Charles Scott, my address is 73 High Forest, Tuscaloosa, Alabama.

Q. What is your occupation? A. My occupation is educational administration.

Q. What is your primary field in education? [1131] A. My title is associatc academic vice-president.

* * *

Q. What is your representation of the University of Alabama in the N.C.A.A.? A. My athletic association at the University of Alabama is as chairman of its committee on intercollegiates. In that [1132] capacity, I represent the institution at N.C.A.A. meetings and at Southeastern Conference meetings, according to assignments from the president.

Q. What positions have you held in the N.C.A.A.? A. I have held a position of vice-president for region three, which placed me on the N.C.A.A. Council. I currently serve as a member of the N.C.A.A. executive committee and I have served on some various other committees as member, as a member of the committee.

* * *

[1133] Q. Now, is Alabama a member of the College Football Association? A. Yes.

Q. And has it been from the beginning, about 1977? A. Yes.

Q. In fact, your president, Doctor Thomas, is one of the new directors? A. That's correct.

* * *

[1134] Q. Where do you believe that controls of the type exercised by the N.C.A.A. since 1973, on college football television, fit into the intercollegiate picture? A. In my judgment, I believe that some kind of controls are necessary in this area. The controls should be at some central level, be it the N.C.A.A. or some other agency that may have some opportunity for control over the institutions [1135] that are participating in such a program.

Q. What do you think would be the consequences of eliminating all controls and leaving football television just free and open? A. I think that the University of Alabama and its current operation of its athletic program would probably still receive considerable amount of attention from television. I think there are other institutions in the country that will continue to—would continue to receive attention, as well, but I think that some effects may be developed that might be detrimental to the current operation. I'm not aware, for example, of any data which I could report which would indicate that the pricing, for example, might be retained where it is. I

can envision a situation, for example, in the State of Alabama where we have two major institutions that networks could be vying against the two institutions, and it's like anything else, when we got lots of it, the price of it in all probability will go down to meet whatever the conditions are.

Q. The other major institution in Alabama is what? A. Auburn University.

Q. They have a major football program? A. They do.

Q. Now, Mr. Scott, in your membership of Alabama in the College Football Association, have you been an active [1136] member there? A. Yes.

Q. And could you describe for the Court the areas in which you have acted? A. At times during the history of the College Football Association, I have been the voting delegate to the College Football Association's annual meeting. I think I have been to all of the meetings, perhaps missing one or two. From the standpoint of the University of Alabama, I think that has been my association.

Q. And from the beginning, what did you understand that Alabama's interest was in being a member of the C.F.A.? A. The University of Alabama provides an athletic program which we think has some stature, and we saw in the College Football Association, the beginnings of a group of individual institutions coming, too, these institutions having a like interest and common interest and wanting to do something about their activities within the N.C.A.A.

Q. What parts of the N.C.A.A. operation did you wish to work toward changing? A. There were some questions about the governance of the organization, I believe if I recall correctly, that the initial impetus for these individuals coming together came about from some changes that took place in the academic standards for administration of student athletes to the [1137] university, and this change came about as a vote of the total membership, and there were representatives among these ma-

jor institutions who felt that these standards should not have been changed as they were.

Q. Did Alabama have a concern about the size of division one A for football purposes? A. Yes, we have had a continuing concern that there were institutions in that grouping that did not provide programs which we thought were the same stature as those we provided.

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[1138] Q. Now, Mr. Scott, did you observe a time when the C.F.A. became interested in football television? A. Yes.

Q. How did that happen and when was it? A. It grew over a period of time, as I recall, I [1139] think it was in the convention—the annual meeting of 1979, when there was some discussion at the annual meeting about some of the financing in the N.C.A.A., and what the effects were; where these funds were going, and some questions of this type, and there was created at that time a study committee, as I recall, each of the conferences was asked to appoint one member to it, and I was asked to be a member of that committee from the standpoint of member of the Southeastern Conference.

• • •

Q. Now, did there come a time when you became chairman of that committee? A. Yes, there did.

[1140] Q. And was that the time when the television plan was developed? A. It was during the time I was serving as chairman that we developed an outline of the program.

Q. Now, could you tell the Court, in general, the similarities, I don't know the details, but the basic pattern of that plan compared to the C.F.A. plan? A. They were quite similar. We determined quite early that the expedient thing to do in determining that plan was to take the N.C.A.A. plan as it is presented annually in the publication and to identify those areas in the plan where there seemed to be concerns on the part of the C.F.A. members and to make adjustments in those statements.

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Q. Mr. Scott, did you make an effort with your T.V. committee and C.F.A. to find out the feelings of the members [1141] on these matters of football television? A. Yes, we did.

Q. How did you go about it? A. We developed a questionnaire early, mid 1980, I believe, and submitted it to the membership to determine their thoughts on certain areas.

Q. Now, did your committee meet from time to time with the N.C.A.A. football T.V. committee to exchange ideas? A. We had met them once before we did that questionnaire and once after.

Q. Was Chairman Wiles Hallock there when you had those two meetings.? A. yes.

Q. Did you then in your development of a possible T.V. plan for the C.F.A., follow the expressed opinions or the judgment of the members? A. We incorporated that information into the adjustments that we made.

Q. And then you reduced the plan to writing, did you? A. Yes.

Q. And I believe that's in evidence, so we won't get into it.

I think the first meeting, I would like to confirm this, between you and the N.C.A.A. T.V. committee was in Monterey, in the summer of 1980, is that correct? [1142] A. It was in Monterey, and it was mid 1980.

Q. Was that more of an exchange of your own television experience? A. Yes. At that time we did not have the information from the institution and we were more or less exchanging personal information of our own.

Q. And was the second meeting in February of 1981? A. The second meeting was a called meeting, yes, it was early 1981.

Q. What happened there? A. We expressed a number of concerns to the committee, these concerns had come from this service.

Q. Now was action taken by the N.C.A.A. regarding those concerns? A. In my judgment, the N.C.A.A. television committee, together with the actions that took place at the special meeting in December, 1981, and the actions taken at the January, 1982, meeting, did meet the issues which we obtained from that survey. There were two issues that were somewhat contradictory in nature and could not be met. There was an indication from the membership that it desired the number of appearances to remain essentially as they were, but there was an indication that there was a desire that the—that some experimentation with two networks be developed.

Well, it seems to me if we expand two networks, we would [1143] need to expand the number of appearances, so other than those two, all of the items in that—all of the issues that came out of the survey, I think, that related to the incident were met in those two or three areas.

Q. And you are referring to the conventions in December of '81, and January of '82? A. That's correct.

* * *

[1144] Q. Did there come expressions in the C.F.A. that this television plan, contract activity, should be used for leverage to gain other objectives? A. In my judgment, we started out with that as an objective, that the television contracts of the N.C.A.A. at that time would terminate on a certain date, and that this [1145] development in the—of the C.F.A. into a television program might be a lever to work at these other issues, whatever they might be, in restructuring the N.C.A.A. and academic standards or whatever. I'm not sure, though, that those issues were truly clearly defined.

Q. Who made the decision for Alabama as to whether it would adhere to the N.B.C. contract? A. The president of the university.

Q. And do you know how he decided or—yes, decided? A. I would answer, no, to both.

Q. To your knowledge, was anyone at Alabama coerced by the N.C.A.A. in connection with the decision as to whether it would adhere to the N.B.C. contract or not? A. I did not, myself, interpret any coercion there, nor did I advise the presidents or the athletic director that coercion existed.

Q. Have any of the groups you have been with or you considered the possibility of setting up a separate association to deal with intercollegiate athletics, apart from the N.C.A.A.? A. I have not worked with any group which developed such a plan. I have stated myself on several occasions that it is not within me to violate rules, that if we get to the point that issues are such that we cannot accept them, then we should consider severance from an organization before picking and choosing those rules which we will adhere to or violate.

[1146] Q. You believe it's feasible for a group of N.C.A.A. to set up a separate organization to perform its function? A. Yes, it would have to duplicate the N.C.A.A., but it can be done.

Q. Mr. Scott, there was testimony earlier in the trial concerning a recent meeting of the C.F.A. members in Dallas, Texas, within a week or so, and it involved a panel discussion at which Mr. O'Malley, Jan Sundberg, and Mr. Wussler appeared. Were you present? A. Yes.

Q. And was that last Friday or Saturday? A. That would have been a week ago today—Friday, afternoon.

Q. And now, what was the purpose of that panel? A. The panel was listed, I believe, in the program as a discussion of television issues or some related topic of that type.

Q. And did there come up a discussion concerning the upcoming season and the football television under the N.C.A.A. plan? A. Both Jan and Kevin reported activities to the present, about the participation of the—both networks in the program the coming year.

Q. And did you pose a question to the panel after they had made the presentations? [1147] A. Yes.

Q. And what was your question? A. The presentation from Jan—

Q. Jan is Jan Sundberg, an attorney from A.B.C.? A. Right, yes. The presentation from Jan Sundberg seemed to say to me that A.B.C. would be paying fixed prices for games this year, a certain price for a national game, and another price for a regional game. Mr. O'Malley, from C.B.S., did not present any fixed toll values, but indicated that they would be announced and I got the impression that they would be inflexible, also. This seemed to be a change in philosophy related to the television contract to me, a change in philosophy from previous years' contracts, to me, so I expressed that thought as an opening statement to them and then I posed a hypothetical football game which would—could not take place in the coming year. I posed the game between the University of Alabama and the University of Georgia in which I indicated that Herschel Walker would have scored some thirty odd touchdowns by the time of that game; that both teams would come to that game with perfect records, nine wins and no defeats, and you have got Mr. Dooley, an outstanding coach on one side, and you have Paul Bryant, an outstanding coach on the other side. I posed the situation in which the University of Alabama would have had four touchdowns in those nine games scored against it, and that both teams have [1148] outstanding other players on the squad.

I simply said, "Now, what would you pay for that game, for Monday afternoon?" You are on the telephone, that's a game you want, and whichever school has that game as a home game says, "I want more. What are you prepared to pay?"

I think that's the gist of what I asked.

Q. And to whom was that question addressed? A. It was addressed to both Jan Sundberg and Kevin O'Malley.

Q. Who responded? A. I believe Jan Sundberg responded first and indicated, as I recall, that my assumption initially was correct, that the fee was not negotiable. Kevin O'Malley, I

would say, hedged a bit in that I believe his statement was that he could never say, "Never," but he didn't think that they would be in a position to get into any competitive bidding.

Now, I'm paraphrasing both of them, but that's the gist of what I recall I heard.

[001158] **CHARLES ALAN WRIGHT**

was called as a witness by the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Harry:

Q. Please state your name and address. A. Charles Alan Wright, 5304 Western Hills Drive, Austin, Texas.

Q. And what is your occupation? A. I am a professor of law for the University of Texas.

Q. And specifically what field are you in, or fields? A. Two; constitutional law and federal courts.

Q. And how long have you been a professor of law at the University of Texas? A. Twenty-seven years.

Q. Twenty-seven? A. Yes, sir.

Q. Have you had other teaching responsibilities? A. I taught five years at the University of Minnesota before I went to Texas. While I have been at Texas, I have [001159] been a visiting professor at the University of Pennsylvania, at Harvard, and Yale.

Q. Could you summarize briefly for the Court your education and professional career? A. I am a graduate of Wesleyan University in Connecticut, and the Yale University Law School. I clerked for one year for the judge at the Second Circuit, and went immediately after that into law teaching.

Q. When did you graduate from Yale Law School? A. Nineteen forty-nine.

Q. And have you written in these fields of law in which you are a professor? A. Yes, sir. I have written a number of books, plus articles.

Q. Are you one of the authors of *Wright and Miller On Federal Practice?* A. I am.

Q. Now, Professor Wright, state for the record, please, whether the University of Texas is a member of the N.C.A.A.? A. It is.

Q. And because of that, have you, or for other reasons as well, served on N.C.A.A. committees? A. The only one has been the committee on infractions. I have been a member of that since 1973.

Q. And what is your present position on that committee? [001160] A. I am chairman of the committee.

Q. Who are the other members?

* * *

The last two I have named are athletic directors; the first four are law professors.

Q. Now, that's a committee of six? A. Yes, sir.

Q. And are any of those—are any members of the infractions committee from the staff of the N.C.A.A.? A. No, sir.

Q. They are all from the institutions— A. Yes, sir.

Q. —either as professor or athletic directors? [001161] A. That's correct.

* * *

Q. Is there a connection between your work on the enforcement committee and the educational objectives of the N.C.A.A.? A. In my judgment, there is.

Q. What is that? A. Intercollegiate athletics. It seems to me that is a legitimate part of educational institutions such as my own.

I have read suggestions that—from most recently, from the American Council of Education, that we ought to have professional teams in the colleges. I think that it would be a terrible mistake.

I think that there is a valid educational role for athletics, but if it is to have that educational role, that all of your institutions have to be operating under the same rules. And it is the function of the infractions committee to the extent that we are able, to see that member institutions do comply with rules that the membership has adopted.

[001162] Q. Is that what you call "competitive balance"? A. Oh, yes. Absolutely.

Q. Would you explain to the Court what that means in your understanding? A. Well, that athletics would be a less valuable part of the educational experience if there were not fair competition among the teams that are going out on the field to compete, and this means not only that you have rules about how many people you can have on your squad, that sort of thing, it also means that our institution should have an equal opportunity to attract young men or women to compete for them.

And a good deal of the N.C.A.A. legislation is intended to preserve this competitive balance among our member institutions.

Q. Now, what generally is the function of the—of your enforcement committee? A. Our function—we are essentially a judicial body within the N.C.A.A. structure. Our staff will bring charges against an institution if it believes that there has been a rule violation. The institution will respond in writing. There is then a hearing, at which the six of us hear the evidence on both sides, make findings of fact, and determine what penalty, if any, should be assessed.

Q. And in the course of those proceedings, does the institution involved have a right to counsel? [001163] A. Oh, yes.

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[001164] Q. Does your committee have any authority to expel a member from the N.C.A.A.? A. No. That could be done only by the annual convention.

Q. And that is spelled out in the constitutional procedures? A. Yes, sir.

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[001167] Q. Do you have a view on the importance of these enforcement procedures to the general N.C.A.A. achievement of its objectives? A. I think my own view is that it is extremely important, and I believe the member institutions have indicated several times that they think it is very important, by increasing the budget and enlarging the enforcement staff. The members want the rules to be enforced, and our committee does the best we can to enforce them.

Q. What do you believe would happen if there were no enforcement procedures to the basic N.C.A.A. rules? A. I think that athletics would be a jungle. It is sometimes a rather difficult place, even with the best enforcement efforts. If we had no enforcement, there would simply be widespread disregard of controlling legislation.

Q. There is in evidence in this case, Professor Wright, an official interpretation regarding football television. It's exhibit number two, and it was made in April of 1981, by the council. Are you familiar with that? A. I believe I know to what you are referring, yes, sir.

Q. And what is the attitude, or what is the relationship of such an interpretation to the rules and regulations which your committee deals with? [001168] A. The constitution provides

that interpretations of the council are binding on the membership. They can be reversed by the membership at the following convention. For that reason, they are binding also on the infractions committee.

The committee does not feel that we have any legislative function, our business is to enforce whatever rules the N.C.A.A. has adopted. And since interpretations, unless reversed, have the same force as the constitution or bylaws, we have to enforce interpretations, as well.

* * *

[001169] Q. Did you have an occasion to discuss the matter with Charles Neinas, the executive secretary of the C.F.A.? A. I did.

Q. Would you tell the Court about when that occurred? A. It occurred some time in August of 1981. He called me with some questions about what, under N.C.A.A. procedures, might happen if his institution entered into contracts with N.B.C. He asked me whether institutions would have a right to a hearing before the infractions committee, or the committee simply act on its own and penalize them.

And I assured him that it would have to be an official inquiry, right to counsel, all of that.

He asked me if it were found that his institution had violated the conditions and obligations of membership, did I think that would mean that the institution would be given sanction in the sport of football.

I told him that as a matter of past history in the conditions and obligations of membership cases that I was familiar with, the penalty always applied to all sports, and not merely to a single sport.

He also—another thing he asked me was would his [001170] institutions be in violation, and would procedures

start on the day they entered into a contract, or on the day that they actually appeared in a televised football game, televised by N.B.C.

I told him I thought that was a very interesting question, to which I did not know the answer.

I subsequently learned that there was an interpretation by the council, and I was not aware of that at the time I talked to Mr. Neinas.

* * *

[001172] *Cross Examination by Mr. Coats:*

Q. All right. Let me hand you—it's been marked, an application, Plaintiffs' Exhibit One Twenty-three, and ask you—I will tell you that it is a xerox copy of an article that appeared here in the *Daily Oklahoman*, by Jerry McConnell. And it has some quotes in there by you, about possible penalties. And I wonder if you recognize that as [001173] being a true and fair statement of what you told Mr. McConnell?

MR. HARRY: Your Honor, I am checking to see if that is in evidence.

MR. COATS: It is not yet in evidence.

THE COURT: I think he's identifying it at this time, Mr. Harry.

MR. HARRY: Very well.

MR. COATS: It hasn't been offered.

MR. HARRY: Have we been furnished a copy?

MR. MUCHMORE: At the preliminary injunction.

MR. COATS: It was in the preliminary injunction. It was in evidence at the preliminary injunction hearing.

MR. MUCHMORE: It's exhibit one twenty-three.

MR. COATS: That was preliminary injunction hearing exhibit number ten.

THE WITNESS: It appears to be an accurate report of a telephone conversation with me.

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[001176] Q. All right, sir. During the time of this—that this controversy involving the schools that had indicated an interest in N.B.C., did you have discussion with Mr. Byers about the possible infractions and the possible penalties thereof? A. I did not.

Q. All right, sir. Did you have any conference with [001177] Mr. Frank or other members of the council? A. I did not.

Q. So the statements that are in the newspaper article are your statements based on your past experience, and the circumstances arising from your experience on the infractions committee? A. That's correct.

[001223] **PAUL KLEIN**

was called as a witness by the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Harry:

Q. Please state your name and address, sir? A. My name is Paul Klein, 5505 Independence Avenue, Bronx, New York.

Q. What is your business, Mr. Klein? A. I'm the president of P.K.O. Television, Limited, a production company.

Q. Would you describe what a production company is and does? A. Well, this production company is a small production company that supplies programs, basically, to television. For instance, right now — we have been in business about three years. Right now, we have a — the American version of an international production with Sophia Loren in Italy. We are producing a soap opera for pay television called "Romans." Prior to that, last year, we did an acclaimed mini series of "People versus Jean Harris," Ellen Burstein.

We did a movie right near here, San Antone, called "Three Hundred Miles," for Steve Knee, with Tony Orlando, a big cast.

We did a movie specifically to play opposite football, called "The Day The Woman Got Even," and we do things like that.

[001224] Q. Now, would you give the Court a summary of your educational and business career prior to the time that you became an independent producer? A. Okay. I — when I graduated from high school, I went into the army air corps, and after that, I went to Brooklyn College and graduated from Brooklyn College in 1953. I then got a job in an advertising agency. I graduated with a degree in mathematics of philosophy. I got a job at an advertising agency where I learned the

rating business and then another advertising agency where I became the head of research, called Arledge and Sherman.

Q. When were there doing that? A. In 1955 to '60, approximately.

Q. Yes. A. And then, January, 1961, I joined N.B.C. I was the supervisor of ratings, and then I worked my way up to manager of ratings, manager of audience measurement and eventually vice-president of audience measurement, which was a very big job at the time; the marketing head, so to speak, of N.B.C., television and radio.

Then I left N.B.C. in 1970, August, 1970, to form my own company called Computer Television, Incorporated, which was trying to begin pay television, pay per view television, and we had an investor, Time, Incorporated, and after about five or six years, they bought me out, and as they bought [001225] out the sister company, which was Home Box Office, and — I went back to work at N.B.C., in 1976, in a marketing job, and then I was made executive vice-president of programs, and I stayed there until March, '79, and then formed P.K.O. Television.

Q. Now, where were you physically located during all of this business career? A. New York City.

Q. You were in New York.

Is that the center of activity in television at this time, for the United States? A. Television advertising, yes, sir, there is a production —there's a lot of production in Hollywood and Burbank. The television sales—television marketing generally comes out of New York.

Q. Now, have you done work and do you do work as a consultant? A. Yes, I have been a consultant to many places, A.B.C.-owned stations; T.V. Guide, all sorts of places; Forum Communications; The Arthritis Foundation. I do a lot of that.

Q. And in what capacity do you consult with those people? A. Basically, the business—the economics of tele-

vision or what kinds of programs to market or what kinds of programs to buy, how much to spend, who to market it to, that [001226] kind of thing, media plans.

Q. Have you been a teacher? A. Yes, I taught the economics of broadcasting at Hunter College, and I have lectured at Harvard and M.I.T. and all over.

Q. And have you testified in court before? A. Yes, I have testified many times in trials, testified for N.B.C. when I was with N.B.C., on antitrust matters, and things like that, and I have testified for Cox Broadcasting, and other people.

* * *

[001227] Q. Mr. Klein, let me ask you to explain to the Court, please, as of now, in the television industry, how essentially in the main elements it operates? A. Well, commercial television, which is different [001228] than pay television and I will talk about that later, commercial television operates this way: The supply—the producer, the distributor, the network or the station, sells audiences to advertisers, for a sum of money which is called the cost per thousand. They assemble these audiences by putting on programs, the programs are immaterial, the only thing that matters after the program is on the air, is the size of the audience, and then that size of the audience is sold to an advertiser. And presumably, the business is a very simple thing; you have to sell your time for more money than you pay for your program, and your administration and your costs and commissions, et cetera, and that's the nature of the business, if you don't do that, then you will have a loss.

* * *

[001230] Q. Now, where do the commercial messages come into this process? A. The commercial messages are placed in and around the advertising, the programming. A network, let's say—let's take a network, for a moment, advertises a program and it has a certain amount, fifteen minutes of an hour of

programming, a little less now than forty-nine, forty-eight, and the rest of the time is devoted to promotion and advertising.

The networks then have a sales force that sells advertising. Now, they sell advertising in two ways: One, if it's a new program, they sell advertising on the cuff; that is, it's—everybody has an idea of what it is going to be and every advertising agency who was the agent for the advertiser, decides what the audience is going to be, but it's from a fixed market. Commercial television up until now has been a limited spectrum business, a very predictable business in that every Tuesday, at nine o'clock at night, there is an audience available, nationwide, and it is predictable. It varies very minor from year to year. The only time it varies is by season.

And so that the networks then divide that time period, that audience up with about sixty sets in use, meaning sixty percent of the homes irrespective of the program content, will be watching television at a given moment in time.

And that the networks then predict what they are going [001231] to get, thirty percent of that, forty percent of that, twenty percent of that, and they have to convince the advertiser that they are going to get a big share of that audience.

Some advertisers are bullish on a program, some are not. But the second kind of programming is one that is renewed, a program that has already delivered a share of audience and has a competitive track record that's a little easier to sell and you can sell that to anybody.

And that's the process that goes on and the advertiser then pays for the audience in terms of a cost per thousand. Some audiences are worth a little more than other audiences; young women are worth more than older women, they buy more, they have kids, they have more needs; young men are worth more than old men, and that's the process.

Q. Is that called demographics? A. Demographics is the term used for — in the United States, this happens to be the only place in the world that it is done, the television audience is measured in homes viewing; that is, sets using television, using a program. You have to get beyond that measure and determine who is in front of the set because a twenty rating of "Happy Days" is not the same as a twenty rating of the "Godfather," I always use that illustration. If those two programs played opposite and got a twenty, the twenty rating with "Happy Days" was full of kids and people who didn't — weren't able to drive [001232] yet, and "Godfather" was full of people who would go diverse and spend a lot of money, and so it was a different value; "Godfather" was worth approximately twice as much for the same rating points.

* * *

[001235] Q. How important is deliverability and what is that? A. Deliverability, the network buys programs from producers, from companies that produce either — actually produce it or have it from other medium. For instance, there are packages of feature items, pictures that have already been made for another market, theatrical exhibition, and Twentieth Century Fox may have twenty pictures in a package. They would then sell those pictures, so they don't need any deliverability, it's there, you can see it, you know the track record of pictures, you know who is in it, and they sell that to a network or local station.

Then there is deliverability in terms of movies made for television. You go to a producer and say, "I like this idea, make the picture," so you know that you are going to get that picture on a certain date.

Then there's deliverability for a series like a situation comedy, you go to Norman Lear, because he's done it and he's able to package it and deliver it all the time. Now, delivering the situation comedy is an interesting thing because the pro-

gram will either be a hit or not a hit, it will either stay on or [001236] won't stay on. You must tie up all the elements of the program in order to assure the network that if he has a hit with the program he bought, that all the elements are deliverable year in and year out, for now, I think it's three-and-a-half or four years, it used to be for seven years, that you had to deliver, but I think they cut that off, it was onerous, so they cut it down to about four years, and you could tie up the people so that when a Gary Coleman, who is on "Different Strokes," rebels and says he wants to go to work some place else, he can't. I win, he just cannot. He is tied to that program contractually. He could retire and never work, and play out his option, in effect, but he can't—that's what he has to do, is work in that program, and he can't work on the program opposite, you have to get — so you get the deliverability of exclusivity, is the case in point.

With a sports package, you have to be able to deliver it. The N.F.L. is the classical case of being able to deliver, not only all the time, but the best games and on the best days.

Q. Now, Mr. Klein, does the network protect the advertiser on this market that he is trying to buy? A. Protect meaning —

Q. In price? A. Yeah — well, there is a — there's a negotiated price, the network comes in and tries to sell an audience [001237] at a thirty share, the advertiser wants to buy it at the lowest possible price, at twenty-five a share. They then negotiate a price, let's say it's based on anticipated twenty-seven share. Okay. That twenty-seven share now is guaranteed; that is, there is twenty-seven times the sets in use, yields a certain number of homes, circulation, and he has to — the network now has to guarantee that circulation at another negotiated price. The other negotiated price is the cost per thousand. He is going to deliver ten million homes at a five-dollar cost per thousand, so the advertiser now pays fifty

thousand dollars, and if nine million homes were delivered, then the network would owe circulation, two comparable circulations, incidentally, to that advertiser.

* * *

[001246] Q. What is the role of competition in all of this market? A. Well, there's two kinds of competition.

The networks are fierce competitors, they compete with each other over the smallest thing. All try to get the money deliverable quantity.

[001247] Whether it be a movie star or a package that somebody puts on, or a movie — the bidding on "Star Wars" was enormous for the television sale.

They compete with each other viciously, but once they have got it, and once they have outbid their competitors and will only go up so high, unless they want to commit financial suicide, they will only go up as high as they think they can sell the program, the anticipated share, the anticipated cost per thousand, and so forth, and they multiple all those numbers and go up that high, and then once they get it, they want exclusivity, they don't want to be faced with a "M.A.S.H." on another network because it would be easy for Twentieth Century Fox to sell it to C.B.S. and turn around and say, "Okay, now, sell 'M.A.S.H.' to A.B.C. and N.B.C.," and then you have sixty-six episodes of "M.A.S.H." on opposite each other.

Q. So the exclusivity is an important factor in the purchase? A. Yes, almost absolute, almost absolute. You want to get a package and you want to get it without — you want to put it in a time period where it doesn't have to face its primary audience, that is the secret of scheduling, it's a very important thing. You want to put a female program opposite two male-appeal programs, and recently "Hill Street Blues" was doing well and C.B.S. moved a female program opposite it, and it's doing *better* than "Hill Street Blues."

* * *

[001250] Q. You said only the numbers count on these programs, will you explain that to the Court? A. Well, during the hype period when a program is going on the air and everybody is talking about the program and how wonderful it's going to be, the best is yet to come, is an expression in television, but the day after the number is in, that's the only thing that matters. The day after the circulation is in, that's the only thing that matters. [001251] The only thing your advertisers care about is what your going to have to pay for it, so "Fame" was built up and puffed up and you will see that, but the day after it got to twenty-three shares — that is, "Fame," the twenty-three share of audience times the sets in use, et cetera, and then the circulation of that program is the only thing that matters. There is no aura any more to "Fame." It is circulation.

The day after it happens, that's the circulation — N.F.L. football on Thursday night or Sunday night is not a big thing, you know, they are a little embarrassed by it because it doesn't get the kind of numbers you get on Monday night, it's a different sport.

* * *

[001254] Q. Now, let's turn to sports programs, Mr. Kline, [001255] and tell the Court, if you will, where it fits into this general programming for television that you have been discussing? A. I have these ways of explaining, so you bear with me for a minute.

The television is broken into day parts.

On Monday through Friday time, because of the nature of the commercial atmosphere in the United States, the men go to work and the women stay home and keep house, in general. Now, this is not specific, but in order to reach men, you wouldn't go ten o'clock in the morning until five o'clock in the

afternoon, you would go something else, but if you wanted to reach women who are home and buy products that are used by women at home, you buy time at that time.

So that's where soap operas go. After five you have a prime time, but still basically women — the weekends, there's two parts of the weekend, early morning the kids — when I was a kid, Saturday morning belonged to me, not on television, but in the movies. And Saturday afternoon and Sunday afternoon are — men are available, and women are not, or don't have to be.

So that the parameter to the network, he is looking at this. He wants to fit programs to time periods, sports is perfect match, if he could figure out something else that was less expensive than sports that gets the men, he would do it.

But right now, that's the match that's — that he thinks [001256] works, and so he places that role. Sometimes they try to build sports into night time and one successful case was "Monday Night Football." There was nothing opposite "Monday Night Football" and A.B.C. and N.F.L. built that into what looks like a franchise that bought up — my son probably thinks the world was created with "Monday Night Football." He doesn't know any better, but I remember when Monday night used to be for sex.

* * *

[001257] Q. Mr. Klein, is the sports aspect of televising on network a part of the general programming that networks look at and use? A. Yeah, they use it and it happens to fit certain time periods, so they use it at certain times. They don't have it other time periods, so it's worthless on other time periods, but I brought up a couple of points before, if they didn't have sports, they would do something else, that's the expression in commercial television.

Last year there was — you know, N.B.C. and A.B.C. had a huge contract and the advertisers had millions of dollars — had millions of dollars of advertising, hundreds of millions of dollars of advertising, just based into a program scheduled for baseball. Baseball went on strike, that money didn't disappear from the market, N.B.C. got most of it by playing other programs, other sports programs.

[001258] The Sugar Ray Leonard fight, before he had his eye problem, was scheduled for Friday night on A.B.C., didn't come off, they played a movie, they made some money, but the biggest thing that ever happened in 1980, there was some four hundred million dollars worth of advertising committed to the Olympics, and we didn't carry the Olympics, it wasn't carried in the United States, and that money was spent elsewhere. Four hundred million dollars wasn't removed from this market, it was—it's in there. The F.C.C. reports all four hundred million was spent, you know, and more than that. And N.B.C. actually came out pretty good on it because they got the first shot at all that, and they repeated "Centennial" and things at that time and did very well with those replacement programs.

Yes, they would have liked to carry it, but they did not carry it, and that was the end of it.

There is not an absolute—you know, an advertiser determines whether he is going to buy that sports program, not the network. The network can't tell the advertiser to do this or that. The advertiser makes up his own substitutions. He says, "I will buy this program, if it's now too high, I will buy something else," like most sporting advertisers, in the fourth quarter, most of the—most advertisers who want sports go first to try to buy the N.F.L. for a full package. And if the N.F.L. gets too high, then they will go to the N.C.A.A. games.

[001259] And then if that gets too high, they will go to a combination of late season baseball, et cetera, et cetera. They

will play it out as best they can. If that goes too high, they will go to "Hill Street Blues" and go to "Saturday Night Live" which gets — actually, it's a better audience than N.C.A.A. football in terms of men eighteen to forty-nine, and they will go to "Sixty Minutes" and go to any place that gets them the same audience. It's very important to know that nobody, I believe, nobody, that watches N.C.A.A. football alone, and nothing else in this underspectrum of television, they watch N.C.A.A. football and a myriad of other programs, so that the advertiser can reach them in other places, and that people can't recall really where they watched the advertising. They can't recall they watched it in the football game.

Q. It is true that the sports programming, in general, then competes across the board with other programs? A. It competes for the advertising dollar because the programming is programming, you know, it's relatively fungible, it's hard to say that to people, but — because they have a commitment to their own programming, but it is fungible.

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[001271] Q. Now, what is the — what is the good feature from the price point of view, the network's point of view, of the N.C.A.A. football package — A. Well —

Q. — desirable feature? [001272] A. Well, one desirable feature is without that feature, I don't think it is madcap time, some organization in this case delivers the package, so that you could plan it and get your—get your share, somebody has to deliver the package.

Q. Is it a known quantity? A. And after it developed with exclusivity, so you don't deliver one against another, you know, half the package, in effect.

Q. But does it fall in the category of programming that you have described as having acquired a number? A. Right, it has acquired a number, it's predictable, rather predictable, not

perfectly predictable, and the rating went up a little this year over last year, but the men eighteen to forty-nine, went down ten percent, which is not good.

Q. What causes — just tell the Court how N.C.A.A. football has achieved this position it now has. A. Well, the way you achieve positions to be on for a long time, on a controlled basis, that you can keep your — if you would envision that all the N.C.A.A. football package is is a producer with a lot of actors, with a staff of actors, some of whom are lead actors and some of whom are supporting actors, and you have to satisfy all your — all your crew, and that's what the N.C.A.A. is doing. It's delivering a satisfactory mix of its actors, and keeping — not having them compete with each other, you know, not having Carroll O'Connor [001273] on two different shows. That would be — you know, what would happen — what happens if you don't have control — if you don't have exclusivity, by definition, you compete against yourself.

The N.C.A.A. with all its power and all the hype and all the promotion only has a twelve rating, which is — you know, nighttime, that would be a huge failure. And it only has a thirty-three share; that is, it can only amass a third of the audience in the place where it's been playing all these years on Saturday afternoon.

If you then divided it in half, you played it on station "A" and station "B" right opposite each other on the two goody-goody dates, you would drive that twelve — maybe I would work that twelve into a thirteen; that is, one would get a seven and the other a six, but it doesn't happen.

Last year, N.B.C. had exclusivity up until last year, on New Year's Night, for the Orange Bowl, and A.B.C. wanted to deprive N.B.C. of that exclusivity and they played the Sugar Bowl.

Q. You're speaking New Year's Day? A. New Year's Night, New Year's Night 1982.

Q. That was Georgia and Pittsburgh playing in the Sugar Bowl? A. One was Clemson and one was Georgia.

Q. Right. [001274] A. Georgia got absolutely wiped out in the space of the Orange Bowl, but they didn't increase the audience that much. You know, the football audience remained fixed, you know. It is a spectrum that is fixed and you can divide it two ways, three ways. They used to divide three ways. I remember when New Year's Day, it was a three-way division, you know, overlaps and all that.

But the less you divide, the more exclusivity you have to get your audience, the better the networks would like it, and the networks only like it because the advertiser likes it. He will pay for that. He pays for that exclusivity. He is not going to pay for it if he doesn't get it.

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[001276] Q. What about the N.C.A.A. television program, does that have a special appeal for television? A. Well, I think it's a matter of program fitting a time period. The day part — the N.C.A.A., because of the nature of college, the games are played on Saturday, and they were played on Saturday before — before television, and they still play it on Saturday, and the attractiveness to a — to a network and to the audience is that when they are — the [001277] audience is available and the network has its choice of all of these games and it could cherry-pick the best games.

Of course, the N.C.A.A. has these rules about not having multiple appearances, but the networks would pick the same, you know, the winning school over and over and over, if they had a free choice and, you know, they would make it "The Clemson Television Show," if they felt they could get the ratings, because they only care about — with all due respect to the N.C.A.A. and — all they only care about is the size of the audience. There's where they are going to make their money.

The difference between what they pay for the program and what they sell the program for, that's all they care about.

Yes, it sounds good, the N.C.A.A. sounds better saying, you know, than some cartoon, it's better than the smirking, but it doesn't have that much aura, because the audience, it doesn't have that aura.

Q. Is it a desirable feature of a package to be able to pick a particular game out of a series as the season builds up and it achieves more interest and significance? A. Yes, I think that's the big—you know, that keeps the package vital because if you were forced into—if you had a schedule, preplanned schedule, since nobody can predict the future, you wouldn't know whether the game is valuable on Saturday night, and that would be a terrible thing, so that you give the opportunity to a network to pick the best [001278] game. The N.F.L. does that on their afternoon games, as well, that the only—only the special games are predetermined, but—that is, the nighttime games and Saturday late season games are predetermined, but the—the second game, the national game for each network is determined late in the—late in the—early in the week of that—after the Sunday game, so they know, you know, that—whether they are going to get a good pairing and exciting game.

* * *

[001282] Q. Mr. Klein, what, in your opinion, would be the consequence of eliminating the N.C.A.A. controls and opening television up to any college to make any deal at any time for the rights to its football games? A. Okay. I think this is what will happen.

The first thing that happens is you don't feel—there's nothing happening at the gate right away, that takes about a year, but the first thing that happens is that—on television [001283] it will happen, what happens at the Sugar Bowl and television—the first thing that happens on television, the one

game everybody free-balling agreements will sell their games. Now, Oklahoma could sell its game pretty good at the beginning because it's still a national enterprise.

But it will play opposite Pittsburgh, Penn State game, or whatever, try to avoid those confrontations, but it will play opposite some big game and a third network will have a game and maybe two ad hoc networks will have a game, maybe not as good, but two ad hoc networks have them. Now, you have this basic football audience, not too big, just a twelve rating, maybe you could squeeze it up to a thirteen or fourteen, but now, you're going to be dividing that three ways, at least, because N.B.C. would jump right in if once it was free-balling. If I were N.B.C., I would jump right in despite A.B.C. and C.B.S. But—so that instead of the twelve, thirteen, fourteen, fifteen that Oklahoma was getting with their big game, they are now—they will get a big number here in Oklahoma City and Tulsa—Tulsa, et cetera, but in Pittsburgh, not because they are not strong, if they had unilateral control over Pittsburgh, you know, they would—they didn't have opposition, they would get a good number in Pittsburgh, but they would play in Pittsburgh opposite, and the people in Pittsburgh, as much as they love Oklahoma, are not watching, are going to watch the Pittsburgh game, and they are going to play, [001284] as terrible as it sounds, in Boston against Harvard, it may not be worth much, but they will go in Boston, and they play in Miami against the Miami game, so instead of getting twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteens, they are going to get sixes.

Now, that's not too terrible, that's not so terrible, it's only terrible because it is now a sport that had a twelve and now when you open the papers has a six. And that is the problem, it's the perception of the buyer, "I'm not getting delivered. In order to buy what I used to be able to buy before, I have to now buy on three different networks."

And the production costs for the game still are going to be what they are called "glitzy" production costs, you still have

eleven cameras there and they are all going to cost a hundred and a hundred and twenty, two hundred thousand dollars to produce and somebody has to pay for that, and it's the advertiser, and the advertiser is not, so what will happen, he will pay less. Even if he pays the same cost per thousand, the colleges will receive less, and they will pay less and less because it will be an overexposed sport, like the fights, and essentially, you know, it will be a nice little local game, very good here, but as I said, in New York, nobody will know Oklahoma, nobody will know Georgia, can't tell them from Georgia-Tech.

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[001285] Q. Now, is the audience in the stadium, the gate, at a game of any factor at all, in television? A. Well, I think it is, and I think a very big one for packing the house.

We — you know, it is important to have a screaming crowd on hand. It makes the game a lot better. If you didn't — if they didn't pay, you would have to let them in for free or something. Because otherwise you don't want to look at a game that, you know, has — the people don't want to go to, you certainly don't want to look at it on television.

[001286] We did this in the beginning with "Saturday Night Life." We made it into a hot ticket, so we would have a screaming crowd, it eventually became a hot ticket, it was free. I think the fact that Ohio State, it's a hot ticket, and the people want to go there, it makes the games look better, the quality of football, who would know one team playing the other, you can't tell the quality. It's what the preception of the thing from a full stand is.

[001291] Q. Mr. Klein, are there other programs that are substitutable on television, on commercial network television, for college football? A. I think that many, many, many programs — and they are, they are substituted all the time, when all the minutes are sold out in college football, and

somebody wants to buy college football, he buys something else, by definition.

Q. Generally, what are those other substitutable programs? A. Well, obviously, other football is — professional football is probably — college football is probably substitutable for professional football, and then all the other sporting — sports available, and then programs that do very, very well in the same audience, carried demographics like "Hill Street Blues," "Saturday Night Live," "Sixty Minutes," and many, many, many more programs.

In fact, you could find some audience — some of college football's audience in any program, and that again, by definition, when you have one week the ball game does a twelve rating, and one it does a ten, and another week it does a fourteen, that audience comes from some place. It comes from the programs opposite. So those people on a day when there's a ten-rated program, are watching something else, and the same people that would have watched football are watching [001292] something else.

Q. So when the college football season is not on, do those advertisers who advertise on college football when it is on, stop advertising? A. They continue to advertise. They continue to look for the efficient buy against the audience that they want to reach, that's what they try to do.

Q. How wide is their choice in that regard? A. We have — every program on the air. They could buy any program they want, if it's not sold out. The only time somebody could raise a price on television is when they are sold out, and somebody is waiting in line to go in, and then you could raise your price; until that time, you can't do anything.

Q. What, in a general sense, is peculiar or unique about college football on television? A. The one unique thing is that the only place it works is the place it's plainly available. That is, on Saturday afternoon, when it plays. Out of Saturday

afternoon it has troubles, of course, because it has to compete against other programs. Saturday afternoons it is uniquely positioned, that's when the games are played, and that's when the audience is available.

The major thing about college football, unlike professional [001293] football which is programmed, in effect, is that this is an unprogrammed event. That is, college football is played nationwide, and any game is capable of being played nationally under the present system, and the network or the networks and the teams have the ability to pick a game and — a game that they are already playing, and televise it. And they have a natural audience for it, and even then, they don't do that well. But they do enough to worth — to be worth a sizable amount of license fee, as they are getting now.

They get a thirty-three share, thirty-two share, twelve rating, ten million homes — the games of some quality, not as good as pro football.

And they — their uniqueness is they fit in the time. If they were on Thursday, if games were played on Thursday afternoon, nobody would have heard of college football. And if they disappear on Saturday, something else will come in its place.

Q. And does this choice to the advertisers to substitute for college football extend beyond the sports markets? A. Absolutely. As I said, "Saturday Night Live" is a better vehicle for Datsun and Budweiser, I know Budweiser spends a lot of money on it.

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[001294] Q. Mr. Klein, do you attribute any significance to the twelve share and the thirty-three share and twelve rating of college football to the way it's packaged and sold? A. I think that we would be—if it were now on two networks, right opposite each other, we would be talking about a six rating and a seventeen share, or something like that, or a seven rating and eighteen share.

One would get—the better game would get a big share of the audience, and the poorer game would get wiped out. But a "little stronger" in television means a lot more rating points. So the success of this program, and all N.C.A.A. football is a program.

The success of this program is the packaging of it, and if you package it differently, you probably won't have success. You may have it; probably won't.

Now, you've got it in a noncompetitive situation, a most desirable situation, where it doesn't have to compete against itself, where it competes against other programs.

* * *

[001300] Q. So as it's packaged and supplied now — A. It's — it's a relatively expensive product, and the networks stand a chance, if business turns down this fall or next fall, or they get more competition and the ratings go down, their ratings go way down, they are going to take a bath.

If they get competition from themselves, they could go down to, instead of ten million homes, five million, six million homes. Their recoupment then will be at eleven thousand a thousand, eleven dollars a thousand — just doesn't occur in commercial television. Rarely occurs, rarely occurs.

So they are looking at a very — could be a disparity situation, but if they got competition from themselves, they would give up their contract. They would say, "That isn't the deal, the deal is exclusivity, that's why I am paying you all this money."

* * *

Q. We were asking before lunch about the feasibility [001301] of continuing with the network series, if controls were removed and N.C.A.A. members were allowed to televise their own games freely. What is your opinion as to the continuance

of the network service? A. As I said before, I just — I sort of alluded to it, if the network has a show that they bought for exclusivity and predicted ten million homes, and paid this kind of license fee for it, and suddenly all over the country they had fairly good competition against them, locally, they would, one, not get the ten million that they probably would have to guarantee to the advertisers. And, therefore, they would say, "I am not doing it, I just can't afford to pay you this kind of money for that — for those programs."

So what you would have then is just local — local football, or they would go out and negotiate lower prices for the national games. They would negotiate prices based on that same five, six dollars that I talked about, for lower ratings, and that's all that would happen.

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[001303] Q. Would it be your opinion that there would be any way of matching the present system of national scheduling and orderly marketing if, in fact, the controls were removed? A. You couldn't do it. You couldn't deliver that, and what you delivered would be lower-rated, and automatically that would be no — the networks say this all the time, they don't want to have competition to the thing that they bought. They want to have no competition to the thing they bought. And so that you will convert whatever the value is of it, you [001304] would convert a good national service that you built through your own controls, so to speak, into a fairly random local business, which maybe Oklahoma will do okay in, but certainly Oklahoma State will get wiped out.

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[001304] *Cross Examination by Mr. Muchmore:*

Q. Mr. Klein, your testimony then is that A.B.C. is paying extra for the packaging that they get, over what they would pay if there were more college football television available on Saturday afternoon? A. Extra, or hundred percent extra? Meaning infinity extra. They may not buy it if they had to compete against it locally, for two reasons:

They would have a low-rated show, and some of their affiliates — some of their very affiliates that they would want to carry the football show, the football game, national game, would be carrying a local game that they, themselves, [001305] want.

Q. So what we are saying, then, is that the N.C.A.A., in their wisdom in the past, in restricting the number of games available on television, has been able to keep the price at a higher level? A. Yes, just like maybe restricting its number of episodes keeps the price at a high level, just like any program.

Q. Now, it's your testimony that for all the hype college football now gets only about a twelve share, is that not correct? A. Twelve rating, thirty-two, thirty-three share.

Q. Excuse me. I made that same mistake. Twelve share means twelve percent of all T.V. homes, right? A. Twelve rating means twelve percent of all T.V. homes.

Q. And twelve share, or thirty-three share, means thirty-three percent of those actually watching T.V.? A. At that moment.

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[001307] Q. And, yet, you stated that when you were with N.B.C., that N.B.C. bid on college football? A. Right.

Q. But you said they didn't get it, because, as you put it, "A.B.C. really wanted it"? A. Right.

Q. Is that correct? A. Right.

Q. And, in fact, C.B.S. has now bid for and gotten a package of college football television? A. Right.

Q. And you testified to fees they were allowed to—N.B.C. would get for it? A. Right. They did, N.B.C. did buy it, I mean, they wanted an N.C.A.A. package. You know, they want it, why not?

Q. I mean in — A. At their price, at the price they want to pay.

Q. It was your testimony, was it not, that if the controls were turned loose, that N.B.C. would bid for it in [001308] addition tc the other two networks? A. There wouldn't be any N.C.A.A. football, but they would bid for football games, sure. Why not? Because they have zero now, so they would have a huge improvement; the other two guys would have a decrease.

Q. And you said that if you were N.B.C., you also would bid for it? A. That's right.

Q. Well, sir, if it is — A. Not — what is it that you are talking about? Not the football, bid for individual games. You are talking about — there's a difference — this is not N.C.A.A. football. This is a different situation, that I would go to Oklahoma and I would bid for a game, right. And so — and then I would go — if I didn't get that, I would go to another school and bid for a game. If I didn't get that, I would go to another school and bid for a game.

And what would happen, Oklahoma would be on opposite the other game, and the other game —

Q. Now, sir, you also testified that of all the viewership on television, N.C.A.A. football is about one percent. Am I not correct? A. Right.

Q. Maybe less? A. One percent, N.C.A.A. nonbowl games, yeah.

[001309] Q. One percent. But the cost of acquiring and putting on N.C.A.A. represents about two-and-a-half percent of the network's cost? A. That's right.

Q. They are paying two-and-a-half times as much per rating point for N.C.A.A. football, aren't they? A. Absolutely. That's why they get in trouble. They pay a lot less on "General Hospital," and they make a hundred million dollars. "General Hospital" pays for their N.C.A.A. football.

Q. Why, Mr. Klein, if A.B.C. is barely breaking even on N.C.A.A. football, and why if they are paying two-and-a-half times as much per rating point, why is it that A.B.C. still, as you put it, "Really wants it"? A. No, that was in 1964. I assume they really want it now, or they probably want it, but —

Q. Why do they want it at all? A. They want it because they think they could make money on it, and it's very difficult to come up with programs that fit that day part, that Saturday day part.

Now, they want Sunday football, too, but they don't have it. But they have Monday night football. They built "Wide World of Sports" because they didn't have football, and they built a very successful franchise on "Wide World of Sports" in 1963. It's a very successful franchise, to [001310] play opposite pro football, they built that to play opposite. Roone Arledge and Allie Sherman built that program, they know how to build programs. Or it might be less expensive for them, even though it's costly, to buy an existing program where there's a track record. You know you are going to get the advertisers. And that — even then, your loss — if their losses are predictable, you build a new program, it costs you half as much money, and you could get a zero rating.

So that — you are buying what is called "insurance" or "protection" when you buy an existing property.

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[001311] Q. And isn't it important to A.B.C. to be able to say at various times in the week, "We are the network that brings you college football"? A. That probably — that's a very important thing, if you could deliver it, they will be glad to say it.

Q. And that was one of the advantages that C.B.S. saw in getting into this marginal situation, too, was it not?

[001312] A. I think so. But C.B.S. has done a lot of strange things. They went into C.B.S. cable, too, so — yes, they wanted to. They have bought a lot of—they bought a lot of sports, they bought N.C.A.A. basketball, and they bought this, and they paid an enormous amount of money for the N.F.L. They are very heavy in sports programming.

Q. And part of that is because network image in sports is important to them? Whether you agree with their wisdom or not, it is important to them, is it not? A. At the time that they make it, it's important to them.

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[001313] Q. Don't the networks generally, though, even if they are ahead in prime time, don't they worry about how they are doing at other times? A. They are worried less if they are ahead in prime time.

Q. But they worry, just the same, don't they? A. They worry about every time period, right.

Q. And one of those time periods that they worry about is Saturday afternoon, is it not? A. Are you — but — college football afternoons, because they only have to worry three months about that. They have nine months not to worry, or worrying about something else in this time period.

Q. My question generally, isn't one of the time periods [001314] the networks look at and worry about is Saturday afternoon? A. Yes, one of the minor time periods.

Q. And that's one of the time periods that they would like to be able to fill, and fill with something attractive? A. Right.

Q. Is that not correct? A. Right. Right.

Q. And what has been the network competition over the last five years, generally, on fall Saturday afternoons? What have the three networks been showing? A. Basically, one network carries — in the fall?

Q. Yes, sir. A. One network carries for the early part of the fall, N.B.C. would carry the baseball games up until the time the World Series was over, and then C.B.S. would make up a sport, and A.B.C. would have the football games.

Q. All right, sir. And it's your testimony that C.B.S. makes up sports to televise in the fall, or has in the past? A. Yeah. They buy — they buy occasional tennis matches, golf matches, and things like that. And then they do "Sports Saturday," I think they call it "Sports Saturday."

Q. How many hours of programming has C.B.S. shown in the recent years on Saturday afternoon? A. How many hours in recent years?

[001315] Q. Yes, sir. Last year, how many hours of programming did C.B.S. show on Saturday afternoon? A. From what time to what time?

Q. How was Saturday afternoon defined in the industry? A. One to five.

Q. All right. A. About half of that time, their program.

Q. And isn't it a fact that now they are buying college football television, that they are going to have to seek increased clearances from their affiliates to show that additional programming? A. Pretty easy to clear it.

Q. I understand that, but they are going to need to do it, aren't they? A. They did it, to clear it. I mean, they did it for the stations.

Q. My point is, as far as half of Saturday afternoons go in the past, C.B.S. has been dark, haven't they, Mr. Klein? A. They have been partly — half of the time they have been dark, yes.

Q. And now they are brightening that darkness with N.C.A.A. football? A. Half the weeks. Half the weeks, sir. Half the weeks, only.

Q. Pardon me? [001316] A. Half the weeks are they troubling at all.

Q. What is your understanding on that? A. Well, here, on the time — the early game, what did they do opposite — what are they doing opposite N.C.A.A. football?

Q. Well, wouldn't you assume they would be doing whatever they did with the half of the afternoon it wasn't dark before? A. So if they increased it that much, I guess — they are going to be noncompetitive again, your case against the other half, as well A.B.C.

Now, if they both carried games, they both carried doubleheaders, then they would both be filled up, right, and then the three networks carried, they would all be filled up with games.

Q. How has N.B.C. football done in the Saturday afternoon battle against the other network programming? A. Pretty good.

Q. What kind of shares has the made-up sports events you were talking about gotten for C.B.S.? A. They didn't clear it that well, probably in the twenties, low twenties. I tell you, the World Series did pretty well.

Q. That's about one Saturday, or maybe two? A. Two — sometimes it's two Saturdays, and the [001317] playoff games might be another Saturday, right, they do okay. The end of the season does okay.

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[001322] Q. All right. Now, I am not limiting you to Michelob, I am asking, is it not true that there are some things that advertisers say, "We would like to have advertised on weekends"? A. Yes. I think Saturday is the worst day for advertising, to be perfectly honest about it, because the stores are closed on Sunday, and it's a very difficult day to recruit advertisers. It's a troubled day. It's good for kids' advertising.

Sunday is a terrific day for advertising, because you got the whole week in front of you. All the car companies like to advertise on Sunday. The car companies don't like [001323] to advertise on Saturday, because the showrooms are closed, but I think now life has changed.

Q. Chevrolet manages to overcome that, don't they? A. I — I cited that before. I thought that Chevrolet was taking that position in the N.C.A.A., really — and keeping the other guys out. By taking the position and buying enough of it to get an exclusive in the market did not insure themselves a successful car year, and they got beaten by guys who could not be in the N.C.A.A. football game, who found the substitute.

Q. You are saying — A. Datsun and Toyota and Honda, and everybody else found the substitute, and still beat them.

Q. My question, Mr. Klein, was Chevrolet wanted to advertise on Saturday afternoon, didn't they? A. Right, and they — and they bought a position, and they didn't do that well.

Q. Well, whether or not you think they are wise, they wanted Saturday afternoon, didn't they? A. Right.

Q. And as a matter of fact, they wanted it badly enough to pay extra to exclude the other car dealer from Saturday afternoon? A. Right. That was a marketing decision.

Q. And in your opinion, the other car dealers didn't [001324] want Saturday? A. They might have wanted it, too, but they got lucky by not getting it.

Q. But Chevrolet thought they wanted it? A. Yes, and so they did.

Q. And they paid something extra in order to have that exclusivity? A. Right.

Q. My question was, aren't there some products — some products, not all, not most — some products that they like to advertise on weekends, including Saturdays? A. Some products on Saturdays, yes, some. Some products on Saturdays in the fourth quarter, some products on Saturdays in the first quarter.

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[001325] Q. Now, you testified that you can't have it both ways, that you either are going to have football exclusively on one or maybe two national packages, or you are going to have it locally. That's your prediction of what we would have if we turned it loose, is that not essentially right? A. I say that if a network bought a package and they had to play it in every market in the United States, or virtually every market, or in the best football market, opposite local football, then they would not get an audience [001326] that they had contracted to buy.

So they will now lower the price of these national games, and lower and lower and lower them, and eventually they will not be able to deliver a critical mass of audience, a network audience. That is not to say I put no value on that. I am not saying this is good or bad.

What you have now is a national program called "N.C.A.A. College Football," that's what you've got. You won't have it if you have the local games competing against the network programming. You just won't have it.

Q. You can't have both a national program and a local program of N.C.A.A. football? A. Competing against each other, you cannot. You won't have it.

[001328] Q. Would you agree, or not agree, that next to professional football, the number one continuous sports series on all of television is N.C.A.A. football? A. I — you know, I believe it's major league baseball, but, you know, in terms of gross amount of viewing of the sport, and dollars, I think baseball, the number of hours presented and the amount of audience watching baseball is greater than N.C.A.A. football.

Q. All right. I guess I should have asked the number-one rated program, as far as a continuous sports series? A. Outside —

Q. Outside the N.F.L. football, that's college football? A. Yes, outside of — yes, I think N.F.L. football is two sports, really, the N.F.C. and A.F.C. The N.F.C. is fifteen-something rating, and A.F.C. is something about the same, a little — a smidge better than N.C.A.A.

But they have big play-offs, they have tournaments, and the tournament is the nature of the game. That's another [001329] problem that you are going to have breaking it up. I put no value on it, but what the N.F.L. does is build on a tournament, what major league baseball does is build towards a play-off where you have a large number of games played between — for huge audiences. You wouldn't have that in a fragmented system, you just wouldn't build that way in a fragmented system.

Q. Well, you said that A.B.C. likes to have the exclusivity that they have had under the present arrangement? A. Right.

Q. And they—that they would—and I guess you would agree, then, that the arrangement as it has been, has been a good thing for A.B.C. because of the exclusivity, they have benefited from time to time? A. I think they like it because it's exclusive. They wouldn't like it if it was not. I think they don't like it as much, now.

Q. The networks like it and the advertisers like it, because they can go to one place and buy that twelve share, instead of having to look around to a half-dozen different places, isn't that right? A. Yes, it's a twelve rating.

Q. Fine. I apologize, that's a mental block. I am sure I understand that. A. That's why I make a living, everybody has their [001330] mental block.

Q. Twelve rating, then. Well, let's go back. The advertiser, as well as the network, like it because they are buying, they can buy that twelve rating in one lump, instead of cutting it up, right? And the colleges like it, or in your opinion they should like it because the packaging, and that means the exclusivity, has allowed them to put on a more viable program? A. They should — I don't make any value judgments whether they should like it. I am talking about that this is a program that has been packaged in a certain way, and it plays that way, and it's successful that way. If it played a different way, it would be a different program.

A lot of things would happen that I say would make it weaker; that is, there would be a lot of it around, that — that it would compete against each other, and the perception of it would be as a weak sport. It would look a lot like hockey.

You know, in Canada, they have hockey nights in Canada, and they have exclusivity, so the ratings go big. In the United States they don't have such a thing, they have franchises playing hockey all over. They get very, very low ratings. They cannot control the output of it, so you make it a weaker sport. Not that hockey would be such a big sport here in the United States, but you would make [001331] college football a weaker sport.

There are some clubs that will survive for a while, but the perception of the sport will be as a low-rated, fragmented local or regional venture, and that's the way it would look. It would look like a local or regional theater, or anything that is local. It will not be the big thing it used to be.

I have no — I don't care, you know, if that happens. I am just saying that that's what is going to happen. It has nothing to do with anything, that's what is going to happen.

Q. Let me put it another way: there are benefits, then, from the exclusivity arrangement for college football? A. There are benefits to — as a program, to exclusivity, absolutely.

Q. Just as there are benefits to the networks? A. Networks want to buy exclusivity. They have bought nonexclusivity, local stations have bought it, they are fighting like crazy to get rid of Ted Turner because he takes "Happy Days" from Atlanta and brings it all the way into Oklahoma City, where it plays on a local station, so the local station is crying bloody murder they want Ted Turner away from there. They want exclusivity on "Happy Days."

Everybody seeks, in television, exclusivity.

Q. Apart from the benefits to the networks and the [001332] advertisers, and to the colleges, tell me what the benefits are to the sports fan who wants a choice of games and wants to be able to watch his local football team play? A. That is a problem. It's like a lot of benefits, that there is no benefit to the public to have only two games in New York, N.F.L. games.

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Redirect Examination by Mr. Harry:

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Q. On your cross examination, you gave a figure that I believe was different from that which you gave on direct, and I would like to see which one is correct here. [001333] A. Right.

Q. I think it involves the amount that A.B.C. paid, the percentage of all programming that A.B.C. paid for the N.C.A.A. series last year. I think the numbers you originally

gave me were thirty million for the N.C.A.A. package, and three million [billion] for all programs?

A. Yes, one percent of the total programming.

Q. So if you said two-and-a-half percent to Mr. Muchmore —

A. Well, it was two-and-a-half percent, I was thinking of the — of the — what it accounts for of the total sports program. It's not—actually, that's all the networks put together, the three million [billion] dollars.

Q. So that the percentage paid for N.C.A.A. of all programming was one percent?

A. Right, one percent, but it's, you know, on the —

THE COURT: I believe he testified concerning college football compared to all programming.

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